

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1289

HAZEL PALMER, et al., Petitioners,

vs.

ALLEN C. THOMPSON, MAYOR, CITY OF
JACKSON, et al., Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Aug. 8, 1965—Complaint filed in United States District Court for the Southern District of Mississippi, Jackson Division.

Aug. 18, 1965—Defendants' Answer filed.

Aug. 18, 1965—Affidavits of George T. Kurts, a defendant, filed.

Aug. 18, 1965—Affidavit of W. D. Rayfield, a defendant, filed.

Aug. 19, 1965—Affidavit of Allen C. Thompson, a defendant, filed.

Aug. 18, 1965—Affidavit of Carolyn Stevens, a plaintiff, filed.

Sept. 15, 1965—Opinion of District Court, in letter form.

Sept. 18, 1965—Findings of fact and conclusions of law filed by District Court.

Sept. 18, 1965—Order of District Court denying plaintiffs' request for a temporary injunction.

Mar. 26, 1966—Stipulation by the parties agreeing that final judgment be entered without further hearing.

Mar. 26, 1966—Final judgment of District Court dismissing plaintiffs' complaint.

Apr. 11, 1966—Plaintiffs' notice of appeal to the Fifth Circuit Court of Appeals.

Aug. 29, 1967—Opinion and judgment of the Court of Appeals.

Oct. 25, 1967—Order of Court of Appeals granting rehearing, en banc.

Oct. 9, 1969—Judgment and opinion on rehearing of the Court of Appeals.

Nov. 23, 1969—Dissenting opinion on rehearing filed in Court of Appeals.

Jan. 7, 1970—Concurring opinion on rehearing filed in Court of Appeals.

United States of America
UNITED STATES DISTRICT COURT
for the Southern District of Mississippi

Hazel Palmer, et al.,

vs.

Allen C. Thompson, Mayor, City of Jackson, Mississippi,
et al.

(Civil Action No. 3790)

(Filed August 18, 1961)

AFFIDAVIT OF CAROLYN STEVENS

County of Hinds,
State of Mississippi—ss.

Personally came and appeared before me, the undersigned authority in and for the County and State of aforesaid Carolyn Stevens, who after being duly sworn by me states upon her oath that:

1. That she is one of the plaintiffs in the above entitled cause.
2. That she is 26 years old and a citizen of the United States and a member of the Negro race and has been a resident of the City of Jackson, County of Hinds, for her entire life.
3. That she is the mother of two minor children ages four and two, who reside with her in the City of Jackson, County of Hinds, Mississippi. Said children are healthy, active and in need of adequate recreational facilities in

order to enjoy the benefits of a normal and healthy childhood.

4. That she is part owner of a certain parcel of real property located within the corporate limits of the City of Jackson upon which various real property taxes have been levied from time to time by public officials and used to defray the expenses of erecting and maintaining certain public facilities including parks in the City of Jackson, Mississippi.

5. That from December 1, 1945 and up until 1963 the City of Jackson, Mississippi by and through the Jackson Department of Parks and Recreation have owned, operated and maintained various public parks within the City of Jackson and at public expenses. These various parks include facilities for various public recreational activities including but without limitation golf, tennis, playgrounds and in particular swimming and wading facilities.

6. That these facilities and parks as of approximately 1960 included at least seven different park facilities and approximately 700 acres of park grounds within the corporate limits of the City of Jackson. Among the parks were the following: Livingston, Battlefield, Riverside, Leavell Woods, Community Park, College Park and the Air Base Recreational facility, all of which except the last named includes wading pool or swimming pool.

7. A full description of each recreational facility referred to in the preceding paragraph appears in an official publication of the Jackson Department of Public Recreation of the City of Jackson. A copy of which is annexed hereto and marked affiant's Exhibit "A".

8. In 1962, the population of the City of Jackson was 150,000, 100,000 of whom were members of the white race and 50,000 of whom were members of the Negro race.

Between the years 1954 and 1963 and continuing up until the present time it was the stated and strict policy of the State of Mississippi and the City of Jackson and the respective officials and representatives to maintain and enforce segregation of the races with regard to creation, operation and use of public facilities including those public parks and swimming facilities hereinbefore referred to and described in Affiant's Exhibit "A".

9. As a part of the policy of racial segregation maintained and enforced by the City of Jackson with regard to swimming facilities, the Department of Parks and Recreation did prior to 1963 maintain separate parks and swimming pool, golf and auditorium facilities for Negroes which separate Negro facilities are identified and described by the City itself in Affiant's Exhibit "A".

10. During the year 1963, and particularly in May and June of that year Negro citizens of Jackson organized together for the purpose of presenting certain grievances of the Jackson Negro Community to the public authorities generally and to defendant Thompson as Mayor of Jackson in particular. A committee representing the Negro community met with defendant Thompson and City Commissioners D. L. Luckey and Tom Marshall on May 27, 1963 to present said grievances to Mayor Thompson and other City Officials. These grievances included a specific demand that the City of Jackson desegregate public facilities including public parks and swimming facilities.

11. Thereafter, and on various occasions, defendant Thompson stated and declared that the public policy of the City of Jackson was to continue segregation of the races with regard to use and operation of City facilities. Affiant has made a study of the newspaper accounts of defendant Thompson's statements regarding segregation of public facilities during the critical months of May and

June of 1963. Defendant Thompson's statements are catalogued in Affiant's Exhibit "B", and display an unequivocal intention on the part of the chief executive of the City of Jackson to prevent integration of the races at public facilities of the City of Jackson at whatever cost (See Affiant's Exhibit "B").

12. Thereafter and on or about May 30, 1963, defendant Thompson was reported as having announced, "Public swimming pools would not be opened on schedule this year due to some minor water difficulty." *Jackson Daily News*, May 30, 1963, p. 1).

13. From May 30, 1963, until the present time swimming and wading pools at all public parks in the City of Jackson has been closed down and inoperative with the exception of the swimming pool at Leavell Woods Park. Since May 30, 1963, white and Negro citizens of the City of Jackson have been deprived of the right to use and enjoy public bathing facilities at all City parks except at the Leavell Woods Park.

14. Affiant states that upon information and belief the Leavell Woods swimming pool has been transferred, leased, or granted to private persons, in particular the Leavell Woods Community Foundation, a non-profit Mississippi Corporation, and/or the Young Men's Christian Association of Jackson, Mississippi . . . which organizations are presently operating said pool in such a way as to prevent Negro citizens including the plaintiffs herein from entering and enjoying the same. Affiant is informed and believes that defendants, acting under color of authority of the law of the State of Mississippi and City of Jackson have closed the swimming and park facilities of the City of Jackson for the sole purpose of preventing Negro citizens of the City of Jackson from enjoying the use and benefit of such facilities.

15. Affiant is further informed and believes that defendants have entered into contractual arrangements with the Young Men's Christian Association of Jackson, Mississippi and/or the Leavell Woods Community Foundation of Jackson, Mississippi. These arrangements were intended to and do have the result of permitting private organizations to operate the swimming pool at Leavell Woods Park in a racially discriminatory manner thus excluding affiant, plaintiffs and other similarly situated from the use and enjoyment of the same. Defendants' acts and conduct as alleged in the preceding paragraphs injure affiant, plaintiffs and others similarly situated as follows:

1) Public pools at Battelfield Park, College Park, Riverside Park, and Livingston Park are being permitted to fall into a state of decline and decay through non-use and improper maintenance.

2) Affiant, plaintiffs and others similarly situated in Jackson, Mississippi, are being denied access to public swimming pools at Leavell Woods Park despite the fact that said pool is being used and enjoyed by white citizens of Jackson.

3) Negro citizens of Jackson and particularly Negro children are required to seek bathing facilities in dangerous circumstances. As the result of this situation, two Negro children, Robert Kelly 14 and Melvin Houseworth 11 were recently drowned while swimming in the Pearl River because public bathing facilities and appropriate supervision was not available to them.

And further Affiant saith not.

(Jurat)

AFFILIANT'S (STEVENS') EXHIBIT "A"

JACKSON DEPARTMENT OF PARKS AND
RECREATION

George Kurtz, Director

Jackson, Mississippi

The Jackson Department of Parks and Recreation began a full time, year-round operation under a Director in December, 1941. Jackson had some parks prior to this time, namely. Livingston, Battlefield, Oakdale, Smith, Hospital, and Poindexter, and operated a summer program of supervised play activities on a small scale.

Operations

The department is composed of the following:

- a. Municipal Auditorium
- b. College Park Auditorium
- c. Public Parks Community Centers and playgrounds
- d. Municipal Golf Course
- e. Negro Municipal Golf Course
- f. Swimming Pools and Livingston Lake
- g. City Concessions
- h. Zoo

The Park and Recreation Department is a division of the Department of Public Works, and is one of the departments under Commissioner D. L. Luckey.

Administration

The department is under the general supervision of the Director of Parks and Recreation. The department has been operating on a full-time basis since December 1, 1945. The department does not function under a Park and Recreation Board as in many cities. Where a department operates under a Board with legal status, it is very similar to the manner in which a Board of Education operates a public school. In Jackson, the City Council, the Director of Public Works, and the Director of Parks and Recreation form the policies and determine the overall operation.

Finance

Operating Funds for the Department come from a 1 mill levy, machines, special events, and miscellaneous. From the General Fund is appropriated supplementary money needed to meet the budget in the overall operation of the Parks and Recreation Department. This, of course, includes capital expenditures. The budget is submitted by the Director of Parks and Recreation, the Superintendent of Park Maintenance, the Director of Public Works, and the Superintendent of the Zoo.

Facilities

Present facilities with brief description follows:

Livingston Park: 80.5 acres, includes picnic grounds in wooded areas, Livingston Lake swimming facility, Municipal Zoo, Municipal Rose Garden, Community Clubhouse with 30 acres of play area. Full time supervision.

Battlefield Park: 53 acres, swimming pool, community house, picnic area, large and well developed playfield including regulation baseball diamonds, 1 lighted Little

League baseball diamond, 1 lighted Babe Ruth baseball diamond, 1 lighted softball field, 3 unlighted softball fields, Tiny Tot play area, low organized activity area, 5 Rubico tennis courts, Tennis Clubhouse, 3 asphalt and 2 clay tennis courts. All parks include swings, slides, seesaws, Jungle Jims and other types of play equipment. This park is under full time supervision.

Riverside Park: 420 acres. A great deal of this park is being developed scenically. A beautiful Nature Trail is nearing completion. Now located here are 8 hard surfaced tennis courts, a large low organized play area equipped with standard apparatus, a wading pool, a beautiful swimming pool, and a picnic area. In another part of the park the high organized area is under development. There are now 3 lighted Little League diamonds, 1 Babe Ruth lighted baseball diamond, and 5 practice diamonds, and the Municipal Archery range. Softball is also featured. A Community Clubhouse is under full time supervision.

College Park: 33 acres—Negro. This beautiful park has a swimming pool, a community house, Tiny Tot lot, wading pool, picnic area, low and high organized activity area, 1 lighted softball diamond, and the Negro Municipal Auditorium, owned by the City, seats 2,400—and was erected at a cost of \$500,000. This park is a full time operation and under Negro staff supervision. Adjacent to and directly north of the Negro Golf Course a 25 acre plot has been acquired for the development of a Negro park for north and northwest Jackson Negroes. Though still in drawing board plans, the park when completed will have a community house, high and low organized activity areas, a picnic area and other facilities normally found on a well developed park.

Airbase Recreation Center is another of Jackson's full time operations. Here is found a large gymnasium, with

play equipment normally found. In addition is a manual training shop, the Arts and Crafts Department, and auxiliary game rooms. At the Center is one regulation baseball diamond, one lighted softball diamond, 3 practice softball diamonds, 4 clay tennis courts, and a low organized play area. In the gymnasium is located the offices of the Supervisor of Sports & Athletics. Full time operation.

Jaycee: 2 acres—with a wading pool, community house, low organized play area. This park is under full time supervision.

In addition to the foregoing, Jackson also has Poin-dexter Park—6 acres; Standpipe Park—5 acres; Capitol Park—6 acres; and Alta Woods Park—4 acres. These parks are maintained year around, and equipment kept in good condition, however, they are under supervision during summer months only.

Municipal Golf Course: This facility of the Parks and Recreation Department, embraces 200 acres, and is 6,990 yards in length. It has a beautiful clubhouse, and is under the control of the Department of Parks and Recreation. Golf fees are \$.75—nine holes.

The course was officially opened for play on October 15, 1949. A Gold Professional is in charge of the course. He has all concession rights pertinent to the operation of the clubhouse, and the city pays him a salary to serve as superintendent of maintenance. Maintenance staff is on the city payroll, and all equipment belongs to the city. The Pro collects all green fees and turns them over to the city.

Negro Golf Course and New Negro Park: The city has purchased land and developed a nine hole—double tee—golf course off Livingston Road near Lake Hico. The course will open in the fall of 1960 along with the dedication of the Negro Golf Clubhouse. The course will be

under the direct supervision of a Negro Professional Golfer. This will be part of the overall operation of the Park and Recreation Department.

Program

The year round activities program of the Department falls into four major categories of operation.

Category I—Routine—This category includes all community house operations and activities, low and high organized activities found daily at all Centers and playgrounds, tennis, supervised play programs, and all other activities which occur daily or weekly. At the present time, year round operations are carried on at Battlefield Park, Livingston Park, Airbase Recreation Center, Jaycee Park, Riverside Park and College Park. Twenty-four supervised play areas were operated during the 1960 summer months—seventeen (17) whites, and seven (7) Negro.

Category II—Annual or Special Events—This category is made up of the following:

	<i>Sponsor</i>
(a) Annual Citywide Marble Contest (White and Negro)	VFW
(b) Annual Citywide Kite Contest (White and Negro)	Dr. J. E. Pettus
(c) Annual Easter Egg Hunt (4 parks)	Jr. League
(d) Public Parks & Playground Tennis Tournament	Department
(e) Mississippi Open Tennis Cham- pionships	Jackson Tennis Club
(f) Annual Arts & Craft Show	Department

	<i>Sponsor</i>
(g) Annual Golf Clinic Tournament for Beginners	Department
(h) Annual Tennis Tournament for Beginners	Department
(i) Special July 4th Programs	Department
(j) Annual Junior Activity Week	Department
(k) Annual Field and Playday Festival	Department
(l) Annual Fishing Rodeo	State Game & Fish Comm. Hinds County Conservation League & Department
(m) Annual Swimming & Diving Championships	Department
(n) Annual Pet Show and Parade	Department
(o) Annual Doll Show	Department
(p) Annual Hallowe'en Party	PTA'S Church Grps— Girl & Boy Scouts Jr. League; Clubs Department
(q) Annual Thanksgiving Dinner for old and needy Negroes	Negro Clubs & Churches
(r) Annual Christmas Party for needy Negro Children	Department
(s) Annual Christmas Carol Sing (Negroes)	Department

Category III—League Operation on Seasonal Basis
Baseball:

Senior Park League—16-18 years	Department
Morning League—13-15 years	Department
Little League—8-12 years	Servian Club
Minor Leagues—8-12 years	
Pony League—13-14 years	
Babe Ruth—13-15 years	Servian Club
American Legion—through 17	

Basketball:

Midget & Pee Wees	Department
Commercial League (men)	Department
Commercial League (women)	Department

Football:

(Department cooperates by providing practice and game facilities)

Gray—Y 9-12 years	Y. M. C. A.
Pee Wees 13-15 years	Y. M. C. A.

Softball:

Commercial League (Men)	Department
Commercial League (Women)	Department
Church League (Men)	Y. M. C. A.
Church League (Boys-14 yrs & under)	Y. M. C. A.
Playground League	Department
Negro Commercial League	Department
Midget Pee Wee League (Negro)	Negro Y. M. C. A.
Y.M.C.A.—Junior League (Negro)	Negro Y. M. C. A.

Category IV—Swimming and Golf

Swimming and golf are the only operations in the Department for which a charge is made for participation. Our \$.10 and \$.20 charge for swimming, and golf green fees of \$.75, \$1.00, and \$1.25 are the lowest to be found anywhere in the country. The fees are kept low in order to serve as many people as possible.

Attendant and Participation

It is always a difficult matter to check attendance when you are unable to get a turnstile count. However, we check our attendance aggregate, participation, and spectators, in the manner prescribed by the National Recreation Association. Our total attendance annually, exclusive of swimming golf and picnic area usage, will approximate 2,000,000.

Objectives

With continued cooperation of the City Council and the lay public we in long range planning will make every effort to achieve for our Parks and Recreation program the national standards as set forth by the National Recreation Association.

AFFIANT'S (STEVENS') EXHIBIT "B"

I. *Jackson Daily News*

May 24, 1962, p.1, (quoting Mayor Thompson):

"We will do all right this year at the swimming pools", the Mayor noted, "but if these agitators keep up their pressure, we would have five colored swimming pools because we are not going to have any intermingling." . . . He said the City now has legislative authority to sell the pools or close them down if they can't be sold.

II. *Jackson Daily News*

May 28, 1963 (quoting Mayor Thompson):

"In spite of the current agitation, the Commissioners and I shall continue to plan and seek money for additional parks for our Negro citizens. Tomorrow we are discussing with local Negro citizens plans to immediately begin a new clubhouse and library in the Grove Park area, and other park and recreational facilities for Negroes throughout the City. We cannot proceed, however, on the proposed \$100,000 expenditure for a Negro swimming pool in the Grove Park area as long as there is the threat of racial disturbances."

III. *Jackson Daily News*

May 24, 1963, p. 1

"Governor Ross Barnett today commended Mayor Thompson for his pledge to maintain Jackson's present separation of the races."

IV. *Jackson Daily News*

May 25, 1963, p. 1

"Thompson said neither agitators nor President Kennedy will change the determination of Jackson to retain segregation."

In The
UNITED STATES DISTRICT COURT
for the Southern District of Mississippi
Jackson Division

Civil Action No. 3790

Hazel Palmer, et al., *Plaintiffs*,

vs.

Allen C. Thompson, et al., *Defendants*.

(Filed August 18, 1965)

AFFIDAVIT OF GEORGE T. KURTS

United States of America
State of Mississippi
County of Hinds

Personally appeared before me, the undersigned authority in and for the jurisdiction aforesaid, George T. Kurts, who having been by me first duly sworn deposes and states on oath as follows, to-wit:

That he is Director of the Department of Parks & Recreation of the City of Jackson, and that he is Manager of the two city auditoriums and has occupied said positions since December 1, 1945.

Affiant denies that the public pool at either Battlefield Park or College Park or Riverside Park or Livingston Park is being permitted to fall into a state of decline and decay through nonuse or improper maintenance, and would show unto the Court that each of said pools is being properly maintained.

Affiant would further show that for the years 1960, 1961, and 1962 the average operating expense of the pools in Battlefield Park, College Park, and Riverside Park was approximately \$10,000.00 each; that the average revenue from the operation of the pools at Battlefield Park and Riverside Park for said years was approximately \$8,000.00 each; that the average revenue from College Park for said years was approximately \$2300.00; that the City of Jackson would suffer a serious financial loss if it attempted to operate said pools, or any of them, on an integrated basis.

George T. Kurts

(Jurat)

CERTIFICATE

The undersigned counsel of record for the defendants in the above styled and numbered action hereby certifies that a true copy of the foregoing affidavit has been this day forwarded by United States Mail, postage prepaid, to Hon. Leonard W. Rosenthal, 313 E. Capital, Jackson, Mississippi, Attorney of Record for the plaintiffs.

This . . . day of August, 1965.

.....

Of Counsel for Defendants

SECOND KURTS AFFIDAVIT

(Filed August 18, 1965)

[Caption Omitted]

United States of America
State of Mississippi
County of Hinds

Personally appeared before me, the undersigned authority in and for the jurisdiction aforesaid, George T. Kurts, who having been by me first duly sworn deposes and states on oath as follows, to-wit:

That he is Director of the Department of Parks & Recreation of the City of Jackson, and that he is Manager of the two city auditoriums and has occupied said positions since December 1, 1945.

That after the decision of the Court in the case of Clark v. Thompson, it became apparent that the swimming pools owned and operated by the City of Jackson could not be operated peacefully, safely, or economically on an integrated basis, and the City decided that the best interest of all citizens required the closing of all public swimming pools owned and operated by the City; that the City thereby decided not to offer that type of recreational facility to any of its citizens; that it has not done so and does not intend to reopen any of said pools.

That all other recreational facilities which the City makes available to its citizens have been completely desegregated and have been made available to all citizens of the City regardless of race; that this includes but is not limited to the golf courses, the playground areas, swings, see-saws, rings, and other playground facilities; that in

1961 the benches were removed from the Livingston Park Zoo, but that no other benches or tables have been removed from any other park or recreational facilities which are open to the public; that the two city auditoriums are maintained for the benefit of all citizens regardless of race, and all such citizens have free access to the use of either or both of said auditoriums; that neither of said facilities has been operated on a segregated basis since 1962; that certain facilities such as the auditoriums and club houses are, from time to time, leased to private organizations for limited use on particular occasions, but that there has been no practice or custom of limiting the leasing of same to white organizations, and that said facilities are available to any responsible private organization without regard to the race of the persons involved.

.....

(Jurat)

AFFIDAVIT OF ALLEN C. THOMPSON

(Filed August 18, 1965)

[Caption Omitted]

United States of America
State of Mississippi
County of Hinds

Personally appeared before me, the undersigned authority in and for the jurisdiction aforesaid, Allen C. Thompson, who having been by me first duly sworn deposes and states on oath as follows, to-wit:

That he is Mayor of the City of Jackson, which position he has held for more than sixteen years; that Jackson is a clean progressive city with approximately one-third of its citizens members of the Negro race; that Jackson had been noted for its low crime rate and lack of racial friction prior to 1961 when the self-styled freedom riders made their visits to this City. As the City rebuilt from the ashes of the Civil War, its white citizens occupied one area and its colored citizens chose to live together in another. As a result, there are large areas of the City occupied almost entirely by white people and other areas occupied exclusively by colored people. As this development took place, the City duplicated its parks, playgrounds, libraries and auditoriums in the white and colored areas. Prior to 1961 the members of each race customarily used the recreational facilities located near their homes. I believe that the welfare of both races would have best been served if this custom had continued. I fully realize that the City does not have the right to require or enforce separation of the races in any public facility. In 1961 at a time when racial tensions were inflamed by the

visits of the freedom riders to Jackson, three Negroes filed suit to enjoin the City from denying them the right to use any and all recreational facilities owned and operated by the City. The Court declined to issue an injunction and granted a declaratory judgment to the effect that the plaintiffs were entitled to the free use of any and all recreational facilities provided by the City. *Clark, et al. v. Thompson, et al.* (decided May 15, 1962), 206 F. Supp. 539, affirmed 313 F.2d 637, cert. den. 11 L.Ed.2d 312.

Realizing that the personal safety of all of the citizens of the City and the maintenance of law and order would prohibit the operation of swimming pools on an integrated basis, and realizing that the said pools could not be operated economically on an integrated basis, the City made the decision subsequent to the Clark case to close all pools owned and operated by the City to members of both races. The City thereby decided not to offer that type of recreational facility to any of its citizens, and it has not done so and does not intend to reopen any of said pools.

All other recreational facilities have been completely desegregated and have been made available to all citizens of the City regardless of race. In 1961 the benches were removed from the Livingston Park Zoo, but no other benches or tables have been removed from any other park, and all facilities of said parks and auditoriums have been and are available to all citizens of the City regardless of race.

Public rest rooms are maintained in City Hall, and same are available to all citizens regardless of race. Public rest rooms are not maintained in the Municipal Court Building for the reason that the efficient operation of said building does not permit the furnishing of these facilities for the general public.

Separate facilities and accommodations for white and Negro prisoners are maintained in the City jail. Such a separation in the jail is necessary for the maintenance of proper discipline and for the safety and protection of prisoners of both races. There is no discrimination between the races as to the quality of the facilities afforded.

.....

(Jurat)

CERTIFICATE

The undersigned counsel of record for the defendants in the above styled and numbered action hereby certifies that a true copy of the foregoing affidavit has been this day personally delivered to Hon. Leonard H. Rosenthal, Attorney of Record for the plaintiffs.

This . . . day of August, 1965.

.....

Of Counsel for Defendants

UNITED STATES DISTRICT COURT

Southern District of Mississippi
Jackson, Mississippi

September 14, 1965

(Filed September 15, 1965)

Re: Hazel Palmer, et al v. Allen C. Thompson,
Mayor, City of Jackson, et al
Civil Action Number 3790(J)

Dear Sirs:

This suit is for a temporary injunction to enjoin any discrimination against the plaintiffs and their race in a class action in their enjoyment of certain public facilities in Jackson, Mississippi. The application is presented on verified complaint, answer denying each material allegation thereof and affidavits of the parties and their witnesses in support of their respective contentions.

In the main, the plaintiffs say that they are discriminated against as Negroes in that they are denied the right of use of city owned and operated swimming pools; and are denied the right to use the city auditorium on South Congress Streets and are required to use the auditorium for negroes on Lynch Street; and that the jail facilities in the city jail are segregated as to race; and that the city does not provide toilet facilities in the municipal court building. These contentions are vigorously denied by the defendants except as to the jail facilities. These facilities will be discussed separately for a better understanding thereof.

The Swimming Pools

The City of Jackson closed all of its colored and white swimming pools in 1963 after the declaratory judgment of this Court was entered to the effect that they must be integrated. No pool has been opened to any citizen of either race since said time and the City Council has decided not to operate any of these pools or permit them to be used on an integrated basis. The Director states that he has reason to fear for the safety of persons using such facilities on said basis. One of the plaintiffs is a taxpayer and has two children whom she desires to use such facilities and complains of the deterioration and waste of such facilities from nonuse, but her affidavit is met by an affidavit of the Director to the effect that such facilities are not deteriorating pending a determination of the Council as to a proper disposition of them. The municipality has no duty or obligation under any statute to operate any swimming pool for any of its citizens, but recognizes its duty to integrate any pool it does operate. The evidence in this case does not show that the plaintiffs or either of them are being discriminated against because of race by reason of the decision of the Council not to operate any pool rather than operate them on integrated basis. Whether or not any pools will be provided or maintained or operated is a question committed by law to the discretion of its managing body. No constitutional right of any plaintiff is involved or impinged upon by that decision of the defendants. The evidence does not support the plaintiffs' contention as to the Leavell Woods pool which does not belong to the city but was leased by the city and that lease was terminated by the city as leasee several years ago.

Rest Rooms

The city maintains public integrated rest rooms in the City Hall but has no public rest room facilities in the Municipal Court Building. No discrimination is involved in that exercise by the municipality of its discretion in that regard. The plaintiffs have no standing in this Court to sue therefor even as taxpayers. No constitutional right of any plaintiff is violated thereby.

The Jail

The municipal jail is segregated as to race. The evidence shows that segregation of the races like segregation of the sexes in the jail is for the best interest of both parties and better comports with the management and supervision of the prisoners. That is not a question with which this Court may properly deal. A state prisoner may not properly complain to this Court and insist upon civil rights that would be his as a free citizen. Section 3374-135, Mississippi Code 1942 requires that white and black prisoners be kept separate. No attack is made by the complaint on that statute but it is mentioned in their brief for the first time. No plaintiff in this case was an inmate of the jail when this suit was filed or at any time prior to the hearing. No plaintiff thus belongs to any class having any right of action therefor and no claim for any violation of any personal right of any plaintiff is shown to exist in this connection. The claim as to this item thus is without merit. No plaintiff avers in the complaint or shows by affidavit that he has been an inmate of the jail or that he is even threatened with the enjoyment of such facilities.

The Parks

The evidence does not show that any municipal park is operated on any racially segregated basis. Benches and tables were removed from one of the parks, but the evidence does not show any discrimination against these plaintiffs by reason of their race, or that they have suffered any more or different treatment in the parks than is accorded every visitor there regardless of race. A small park on Bailey Avenue was closed by the municipality by reason of the conduct of some of the patrons or their children as detailed in the affidavit of George T. Kurts on August 17, 1965, which affords abundant just and proper cause for the closing of that park. No discrimination is involved in the closing of that park. As in the case of swimming pools, the municipality has a wide discretion which it may exercise and has properly exercised in that case. There is no merit in this claim.

Congress Street Auditorium

It is claimed that the city auditorium on Congress Street is operated on a segregated basis for the white people only, and that Negroes are obliged to use only the Lynch Street auditorium. There is no evidence before the Court to support that contention. The undisputed evidence on behalf of the defendants is completely to the contrary. This Congress Street auditorium is available to white people and colored people alike on the same basis with no discrimination as to race. This item of the complaint is without factual support.

In short, the plaintiffs have not shown by a preponderance of the evidence any need or necessity for an injunction, or the propriety of the issuance of an injunction by this Court under the circumstances shown. The temporary

injunction will, therefore, be refused. If the parties can agree that this hearing be treated as a hearing on the merits and if they will so stipulate, the complaint will be dismissed. A proper order or judgment may be presented for entry herein accompanied by a more detailed Finding of Facts and Conclusions of Law as required by the rules.

Yours very truly,

s/ Harold Cox

WHG:afc

Mr. Thomas Watkins

Mr. L. H. Rosenthal

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed September 18, 1965)

[Caption Omitted]

This Action came on for hearing on plaintiffs' motion for a temporary injunction against the defendants, as the Mayor, Commissioners, Chief of Police, and Director of Recreation of the City of Jackson, Mississippi. The complaint alleges that the defendants have discriminated against the plaintiffs in connection with the operation and maintenance of the public swimming pools, the auditoriums, certain public rest rooms, and the jail facilities of the City of Jackson. Specifically, plaintiffs complain because of the closing of the public swimming facilities, because of the alleged failure to furnish public rest room facilities in City Hall and in the Municipal Court Building, because of the alleged discrimination against Negroes in the use of the City auditoriums, and because of alleged separation of the races in the municipal jail. The Court has considered the verified complaint, the answer filed by the defendants, the affidavits filed by the parties, briefs submitted, and oral arguments of counsel for the respective parties.

Findings of Fact

The City of Jackson closed all swimming pools owned and operated by it in 1963, following the entry of a declaratory judgment by this Court in the case of *Clark v. Thompson*, 206 F. Supp. 539, affirmed 313 F.2d 637, cert. den. 376 U.S. 951, 84 S.Ct. 440, 11 L.Ed.2d 312. No municipal swimming facilities have been opened to any citizen of either race since said time, and the City Council does not intend to reopen or operate any of these public swimming facilities on an integrated basis. The personal safety of the citizens of the City and the maintenance of law and order would be endangered by the operation of public swimming pools on an integrated basis. These pools could not be economically operated in that manner. Although closed, the swimming facilities owned by the City are being properly maintained. In addition to closing the swimming facilities owned by it, the City cancelled its lease covering the Leavell Woods swimming pool in 1964.

Public rest rooms are maintained in City Hall, and same are available to all citizens regardless of race. Public rest rooms are not maintained in the Municipal Court Building because the efficient operation of said building does not permit the furnishing of these facilities to the general public.

Separate facilities and accommodations for white and Negro prisoners are maintained in the City jail. Such a separation in the jail is necessary for the maintenance of proper discipline and for the safety and protection of prisoners of both races. There is no discrimination between the races as to the quality of the facilities afforded in the jail. None of the plaintiffs was an inmate of the municipal jail at the time this action was filed, and none of them has been an inmate of said jail at any time since said date.

The facilities in public parks are available to all citizens regardless of race. In 1961 the benches were removed from the Livingston Park Zoo, but no other benches or tables have been removed from any other park. There is no evidence that any municipal park is operated on a racially segregated basis. On July 14, 1964, a small park on Bailey Avenue was closed by the City because of the conduct of some of the persons using the park. Proper reasons existed for the closing of the park, and no discrimination is involved.

The two City auditoriums are maintained for the benefit of all citizens regardless of race, and all citizens have free access to the use of either or both of said auditoriums. Neither of said facilities has been operated on a segregated basis since 1962. The two City auditoriums are available to white people and colored people alike on the same basis, with no discrimination as to race. No factual basis exists which would justify the issuance of the temporary injunction prayed for.

Conclusions of Law

The plaintiffs have no constitutional right to require the City of Jackson to maintain or operate specific facilities such as swimming pools, benches in parks, or public rest rooms in any particular building. Any public facility furnished by the City would have to be available to all citizens regardless of race. As to whether any particular facility will be furnished, the City officials exercise judgment on a matter committed to their wisdom which is not subject to review by any Court in the absence of violation of constitutional rights. *City of Montgomery v. Gilmore*, U.S.C.A. 5th, 277 F.2d 564; *Lagarde v. Recreation & Park Commission*, D.C. La. 229 F.Supp. 379. No person has a constitutional right to swim in a public pool. *Tonkins v.*

City of Greensboro, D.C. N.C., 162 F.Supp. 549. Where a public facility is closed to members of all races, any issue as to discrimination becomes moot. *Clark v. Flory*, U.S.C.A. 4th, 237 F.2d 597; *Wood v. Vaughan*, D.C. Va., 209 F.Supp. 106; *Walker v. Shaw*, D.C. S.C., 209 F.Supp. 569.

The plaintiffs lack standing to enjoin the operation of jail facilities on a segregated basis where none of them is an occupant of said facilities. *Bailey v. Patterson*, 369 U.S. 31, 82 S.Ct. 549, 7 L.Ed.2d 512; *McCabe v. Atchison T. & S. F. Ry. Co.*, 235 U.S. 151, 35 S.Ct. 69, 59 L.Ed. 169; *Brown v. Board of Trustees*, U.S.C.A. 5th, 187 F.2d 20; *Kansas City, Mo., et al v. Williams, et al.*, U.S.C.A. 8th, 205 F.2d 47; *Clark v. Thompson*, D.C. Miss., 206 F.Supp. 539, affirmed 313 F.2d 637, cert. den. 11 L.Ed.2d 312 (376 U.S. 951, 84 S.Ct. 440).

The City is required by Section 3374-135, *Mississippi Code of 1942*, to provide separate facilities for prisoners with respect to race and sex. Federal Courts are reluctant to interfere in the administration of state prisons. *United States ex rel Wagner v. Ragen*, 7 Cir., 213 F.2d 294; *Adams v. Ellis*, 5 Cir., 197 F.2d 483; *Curtis v. Jacques*, D.C., 130 F.Supp. 920; and *United States ex rel, Yaris v. Shaughnessy*, D.C., 112 F.Supp. 143. No one has a constitutional right to integrated jail facilities, and same may be operated on a segregated basis where separation is deemed necessary for the maintenance of proper discipline and for the safety of the prisoners. *Nichols v. McGee*, D.C. Calif., 169 F.Supp. 721, appeal dismissed 30 S.Ct. 90, 361 U.S. 6, 4 L.Ed.2d 12; *Bryant v. Harrelson*, D.C. Tex., 167 F.Supp. 738; *United States ex rel. Morris v. Radio Station WENR*, U.S.C.A. 7th 209 F.2d 105; and *Tabor v. Hardwick*, U.C.C.A. 5th, 224 F.2d 526.

An injunction is an extraordinary and unusual writ. *Bailey, et al v. Patterson, et al, supra*. This type of relief should be awarded only in clear cases, reasonably free from doubt, and only when necessary to prevent great and irreparable injury. *28 Am. Jur., Injunctions, Section 25, page 515*. The plaintiffs have not shown by a preponderance of the evidence any need or necessity for an injunction, and the application for a temporary injunction is, therefore, denied.

ORDER

(Filed September 18, 1965)

[Caption Omitted]

This Action came on for hearing on the application of the plaintiffs for a temporary injunction, and the Court having fully considered the pleadings, affidavits, and authorities submitted by the parties, and being of the opinion that the plaintiffs are not entitled to the relief requested and that their application should be denied;

It is, Therefore, Ordered and Adjudged by the Court that the application of Hazel Palmer, et al, as plaintiffs in this case, for a temporary injunction be and the same is hereby denied.

It is Further Ordered and Adjudged that the Court's letter opinion of September 14th, 1965, and the Court's Findings of fact and Conclusions of Law in accordance with Rule 52 of the Federal Rules of Civil Procedure, are made a part hereof by reference.

Ordered and Adjudged, this — day of September, 1965.

.....
United States District Judge

STIPULATION

(Filed March 26, 1966)

[Caption Omitted]

It is Hereby Stipulated and agreed by and between counsel for the plaintiffs and the defendants in the above styled and numbered action that this action be and the same is hereby submitted to the Court for final decision on the merits on the complaint, answer, and affidavits heretofore filed and submitted by the parties, and on the full and complete hearing heretofore afforded the parties, at which all parties had an opportunity to offer any and all evidence desired, and on this Court's letter opinion filed herein dated September 14, 1965, and on this Court's separate findings of fact and conclusions of law filed herein by this Court in connection with this Court's order overruling plaintiffs' application for a temporary injunction.

It is Further Stipulated and agreed that a final judgment may be entered herein on the foregoing without further hearing and without the offering of any further or additional evidence herein.

This 23rd day of March, 1966.

L. H. Rosenthal

Of Counsel for Plaintiffs

Thomas H. Watkins

Of Counsel for Defendants

FINAL JUDGMENT

(Filed March 26, 1966)

[Caption Omitted]

This Action came on for final hearing on the merits by agreement of the parties on the complaint, answer, and affidavits heretofore filed and submitted by the parties and on the full and complete hearing heretofore afforded the parties, at which all parties had an opportunity to offer any and all evidence desired, and on the stipulation of counsel for all parties dated March 23, 1966, and filed herein, and the Court finding that the plaintiffs are not entitled to any of the relief prayed for herein and that the complaint filed herein should be finally dismissed with prejudice.

It is, Therefore, Ordered, Adjudged, and Decreed that the complaint filed herein be and the same is hereby finally dismissed with prejudice with all Court costs incurred herein taxed against the plaintiffs.

It is Further Ordered, Adjudged, and Decreed that this Court's letter opinion of September 14, 1965, and its Findings of Fact and Conclusions of Law heretofore filed herein in accordance with Rule 52 of the Federal Rules of Civil Procedure be and the same are hereby made a part hereof by reference.

Ordered, Adjudged, and Decreed this — day of March, 1966.

.....

United States District Judge

Approved as to Form:

L. H. Rosenthal

Of Counsel for Plaintiffs

Thomas H. Watkins

Of Counsel for Defendants

OPINION OF COURT OF APPEALS

HAZEL PALMER et al., *Appellants*,

v.

ALLEN C. THOMPSON, Mayor, City of Jackson et al.,
Appellees.

No. 23841

United States Court of Appeals Fifth Circuit

(Filed August 29, 1967)

(Appearing in 391 F2d 324)

Before RIVES, COLEMAN and GODBOLD, Circuit
Judges.

RIVES, Circuit Judge.

Twelve Negro citizens and residents of Jackson, Mississippi, on their own behalf and "on behalf of the thousands of their fellow Negro citizens and residents * * * who are similarly situated because of race and color," filed a complaint against the Mayor and Commissioners of Jackson, its Police Chief, and its Director of Recreation, seeking to enjoin their allegedly discriminatory conduct. After joinder of issue and the filing of affidavits and stipulations showing the facts, the case was submitted to the district court for final decree on its merits. The court found that the plaintiffs were not entitled to any of the relief prayed and dismissed the complaint. On appeal the plaintiffs seek review on two points stated in their brief as follows:

"First Point

"Where a local government closes its previously segregated public facilities to avoid a judgment declaring that Negroes have a right to use the facilities

on an integrated basis, the closing violates the equal protection clause of the Constitution of the United States and Negro residents have a cause of action against the local government to compel re-opening of the facilities. The trial court erred in denying appellants' request for injunctive relief from appellees' discriminatory closing of the pools.

"Second Point

"Segregation of the races in municipal jails is forbidden by the Fourteenth Amendment. Where segregation of public facilities is pursuant to a state statute, such statute is unconstitutional as contrary to the Fourteenth Amendment, and the trial court erred in denying appellants' request to enjoin operation of such facilities in a segregated manner."

There seems to be no dispute as to the facts; certainly the findings of fact are not clearly erroneous. Rule 52(a), Fed.R.Civil P. As to the swimming pools, the district court found the facts as follows:

"The City of Jackson closed all swimming pools owned and operated by it in 1963, following the entry of a declaratory judgment by this Court in the case of *Clark v. Thompson*, 206 F. Supp. 539, affirmed 313 F.2d 637, cert. den. 376 [375] U.S. 951, 84 S.Ct. 440, 11 L.Ed2d 312. No municipal swimming facilities have been opened to any citizen of either race since said time, and the City Council does not intend to reopen or operate any of these public swimming facilities on an integrated basis. The personal safety of the citizens of the City and the maintenance of law and order would be endangered by the operation of public swimming pools on an integrated basis. These pools could

not be economically operated in that manner. Although closed, the swimming facilities owned by the City are being properly maintained. In addition to closing the swimming facilities owned by it, the City cancelled its lease covering the Leavell Woods swimming pool in 1964."

The district court's conclusions of law relating to the operation of the swimming pools were:

"The plaintiffs have no constitutional right to require the City of Jackson to maintain or operate specific facilities such as swimming pools, benches in parks, or public rest rooms in any particular building. Any public facility furnished by the City would have to be available to all citizens regardless of race. As to whether any particular facility will be furnished, the City officials exercise judgment on a matter committed to their wisdom which is not subject to review by any Court in the absence of violation of constitutional rights. *City of Montgomery v. Gilmore*, U.S. C.A. 5th, 277 F.2d 564 [364]; *Lagarde v. Recreation & Park Commission*, D.C.La. 229 F. Supp. 379. No person has a constitutional right to swim in a public pool. *Tonkins v. City of Greensboro*, D.C.N.C., 162 F.Supp. 549. Where a public facility is closed to members of all races any issue as to discrimination becomes moot. *Clark v. Flory*, U.S.C.A. 4th, 237 F.2d 597; *Wood v. Vaughan*, D.C.Va., 209 F.Supp. 106; *Walker v. Shaw*, D.C.S.C., 209 F. Supp. 569."

[1] The appellants urge that the City may not abandon the operation of public swimming pools to prevent them from being desegregated, and that to do so is contrary to the teaching of *Mulkey v. Reitman*, 1966, 64 Cal.2d 529, 413 P.2d 825, aff'd, May 29, 1967, U.S. No. 483, Oct. Term

1966, and of *Griffin v. County School Board of Prince Edward County*, 1964, 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed. 2d 256. In our opinion, the holding in neither of these two cases extends so far as to prevent the City from closing its swimming pools when they cannot be operated economically or safely as integrated pools.

The basic holding in *Mulkey v. Reitman*, according to our understanding, was that the State had become significantly involved in private discriminations against Negroes concerning residential housing. In *Griffin* the Supreme Court held that,

"For the reasons to be stated, we agree with the District Court that, under the circumstances here, closing the Prince Edward County schools while public schools in all the other counties of Virginia were being maintained denied the petitioners and the class of Negro students they represent the equal protection of the laws guaranteed by the Fourteenth Amendment." 377 U.S. at 225, 84 S.Ct. at 1230.

The Court further held that, "Accordingly, we agree with the District Court that closing the Prince Edward schools and meanwhile contributing to the support of the private segregated white schools that took their place denied petitioners the equal protection of the laws." 377 U.S. at 232, 84 S.Ct. at 1234. Neither those cases nor any other authority can permit a federal court to require a city to operate public swimming pools when to do so would endanger the personal safety of the city's citizens and the maintenance of law and order.¹

¹ We further agree with the finding of the district court that no racial discrimination was involved in the City's cancellation of its lease covering the Leavell Woods swimming pool.

The district court's findings of fact as to the City jail were as follows:

"Separate facilities and accommodations for white and Negro prisoners are maintained in the City jail. Such a separation in the jail is necessary for the maintenance of proper discipline and for the safety and protection of prisoners of both races. There is no discrimination between the races as to the quality of the facilities afforded in the jail. None of the plaintiffs was an inmate of the municipal jail at the time this action was filed, and none of them has been an inmate of said jail at any time since said date."

The conclusions of law relating to the operation of the City jail were:

"The plaintiffs lack standing to enjoin the operation of jail facilities on a segregated basis where none of them is an occupant of said facilities. *Bailey v. Patterson*, 369 U.S. 31, 82 S.Ct. 549, 7 L.Ed.2d 512; *McCabe v. Atchison T. & S. F. Ry. Co.*, 235 U.S. 151, 35 S.Ct. 69, 59 L.Ed. 169; *Brown v. Board of Trustees*, U.S.C.A. 5th, 187 F.2d 20; *Kansas City, Mo., et al. v. Williams, et al.*, U.S.C.A. 8th, 205 F.2d 47; *Clark v. Thompson*, D.C.Miss., 206 F.Supp. 539, affirmed [5 Cir.] 313 F.2d 637, cert. den. 11 L.Ed.2d 312, 376 [375] U.S. 951, 84 S.Ct. 440.

"The City is required by Section 3374-135, Mississippi Code of 1942, to provide separate facilities for prisoners with respect to race and sex. Federal Courts are reluctant to interfere in the administration of state prisons. *United States ex rel. Wagner v. Ragen*, 7 Cir., 213 F.2d 294; *Adams v. Ellis*, 5 Cir., 197 F.2d 483; *Curtis v. Jacques*, D.C. 130 F.Supp. 920;

and *United States ex rel. Yaris v. Shaughnessy*, D.C. 112 F.Supp. 143. No one has a constitutional right to integrated jail facilities, and same may be operated on a segregated basis where separation is deemed necessary for the maintenance of proper discipline and for the safety of the prisoners. *Nichols v. McGee*, D.C. Calif., 169 F.Supp. 721, appeal dismissed 80 S.Ct. 90, 361 U.S. 6, 4 L.Ed. 2d 52; *Bryant v. Harrelson*, D.C. Tex. 187 F.Supp. 738; *United States ex rel. Morris v. Radio Station WENR*, U.S.C.A. 7th, 209 F.2d 105; and *Tabor v. Hardwick*, U.S.C.A. 5th, 224 F.2d 526."

We agree with the district court that the appellants-plaintiffs lack standing to challenge the segregated operation of the City jail.² The thrust of the complaint aims at the alleged segregated operation of public recreational facilities in Hinds County, Mississippi. Appellants carefully show that they brought the "action on their behalf and on behalf of thousands of their fellow Negro citizens * * * who are racially segregated and discriminated against by the defendants * * * in the use and enjoyment of public recreational facilities in Hinds County, Mississippi."

Thereafter in the complaint, the appellants list numerous public facilities, among them parks, city auditoriums, swimming pools, and the City jail, alleging that each was operated on a segregated basis. Injunctive relief, prohibiting the segregated operation and management of each facility was requested. As noted at the beginning of this opinion, only the relief in regard to the swimming pools and the City jail is before this Court.

² The law as to whether the City may racially segregate the prisoners in its jail probably will be settled when the Supreme Court decides the case of *Lee v. Washington*, No. 75 on its 1967-68 Appellate Docket.

[2, 3] It is clear that though standing is alleged for those persons who are discriminated against in the use of recreational facilities, there is a prayer for relief in non-recreational areas. Standing to enjoin discrimination in the operation of non-recreational facilities must be apparent from the complaint. Normally a person cannot challenge the constitutionality of a statute unless he shows that he himself is injured by its operation. See *Barrows v. Jackson*, 1953, 346 U.S. 249, 255, 73 S.Ct. 1031, 97 L.Ed. 1586, and cases cited in footnote 3 of that opinion. That case further holds that "even though a party will suffer a direct substantial injury from application of a statute, he cannot challenge its constitutionality unless he can show that he is within the class whose constitutional rights are allegedly infringed." *Barrows v. Jackson*, *supra*, at p. 256, 73 S.Ct. at 1035.

To qualify under these broad principles, a person seeking relief has been required to show "past use of the facilities, where feasible, and a right to, or a reasonable possibility of future use." *Singleton v. Board of Commissioners*, 5 Cir. 1966, 356 F.2d 771, 773, In *Bailey v. Patterson*, 1962, 369 U.S. 21, 32-33, 82 S.Ct. 549, 550, 7 L.Ed.2d 512, the Supreme Court held:

"Appellants lack standing to enjoin criminal prosecutions under Mississippi's breach-of-peace statutes, since they do not allege that they have been prosecuted or threatened with prosecution under them. They cannot represent a class of whom they are not a part."

In *McCabe v. Atchison, T. & S. F. R. Co.*, 1914, 235 U.S. 151, 163, 35 S.Ct. 69, 59 L.Ed. 169, the Court noted that the complaints were too vague and indefinite to warrant relief because none of the plaintiffs alleged that he was denied any rights, that he was injured in any manner, or that

he had been discriminated against on account of his race. Specifically the Court held (at p. 162, 35 S.Ct. at p. 71) that

"The complainant cannot succeed because someone else may be hurt. Nor does it make any difference that other persons who may be injured are persons of the same race or occupation. It is the fact, clearly established, of injury to the complainant—not to others—which justifies judicial intervention."

[4] The need for showing future use by the complainant is often waived where the person has been injured or aggrieved by his use of the facilities in the past. *Mitchell v. United States*, 1941, 313 U.S. 80, 61 S.Ct. 873, 85 L.Ed. 1201; *Evers v. Dwyer*, 1958, 358 U.S. 202, 79 S.Ct. 178, 3 L.Ed.2d 222; *Anderson v. City of Albany*, 5 Cir., 1963, 321 F.2d 649. What seems to be clear from the cases is (1) that the party must have been aggrieved and (2) that either he or the class of which he is a member may be aggrieved by the use of the segregated facility.

[5] The problem becomes complex when we consider desegregation of jails. Unlike recreational facilities, such as swimming pools and parks, or service facilities, such as buses, jails are not places which most people seek or normally expect to use or occupy. It seems, therefore, that the only person who presently is incarcerated or is threatened by government officials with incarceration is a person (1) who has been aggrieved and (2) who is a person or a member of a class that may be aggrieved in the future by the operation of segregated jails.

[6,7] The language in *Evers v. Dwyer*, *supra*, 358 U.S. at p. 204, 79 S.Ct. at p. 179, applies to citizens in general who wish to use public facilities:

"A resident of a municipality who cannot use transportation facilities therein without being subjected by statute to special disabilities necessarily has, we think, a substantial, immediate, and real interest in the validity of the statute which imposes the disability."

There is no need to show future use by the complainant in the situation. A prison case presents a different problem, one more properly controlled by *Bailey v. Patterson*, *supra*. For as Judge Tuttle noted in *Anderson v. City of Albany*, *supra*, 321 F.2d at 653, the Supreme Court's statement in *Bailey* that "they cannot represent a class of whom they are not a part" shows that some classes who are denied rights because of race may be limited to just certain individuals of that race. All members of the particular race are not automatically members of the deprived class simply because they are of the same race as the members of the class. *McCabe v. Atchison, T. & S. F. R. Co.*, 1914, 235 U.S. 151, 35 S.Ct. 69, 59 L.Ed. 169. All Negroes are not members of the class consisting of Negro prisoners and those Negroes threatened with imprisonment.³

[8] The appellants did not allege that they were confined in the City jail at the commencement of this action

³ There are exceptions to the standing rules. In exceptional circumstances, where it would be difficult, if not impossible, for persons whose rights are being denied to present their grievances to the courts, a third party may raise another's rights. *Griswold v. State of Connecticut*, 1965, 381 U.S. 479, 481, 85 S.Ct. 1678, 14 L.Ed.2d 510; *Barrows v. Jackson*, 1953, 346 U.S. 249, 257, 73 S.Ct. 1031, 97 L.Ed. 1586; *Pierce v. Society of Sisters*, 1925, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed 1070. This case offers no exceptional circumstances which would allow the appellants to present the grievance of those who are confined or threatened to be confined in the allegedly segregated City jail.

or have been threatened with incarceration.⁴ Appellants have not shown that they are within a class whose right to a nonsegregated jail has been denied or will be denied. Certainly, pleadings may be liberally construed, *Lewis v. Brautigam*, 5 Cir. 1955, 227 F.2d 124, 55 A.L.R. 2d 505; *Beard v. Stephens*, 5 Cir. 1967, 372 F.2d 685; but here we find no foundation upon which standing as to the jail issue may be based.

The judgment of the district court is Affirmed.

JUDGMENT OF THE COURT OF APPEALS

[Caption Omitted]

(Filed Aug. 29, 1967)

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

On consideration whereof; It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Hazel Palmer, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

August 29, 1967

Issued as Mandate: Sept. 20, 1967

⁴ In *Singleton v. Bd. of Commissioners*, 5 Cir. 1966, 356 F.2d 771, 774, we carefully noted that the plaintiffs there were subject to the probationary jurisdiction of the Board of Commissioners of State Institutions and the juvenile Court:

"The plaintiffs' probationary status brings them well within the future-use requirement for standing."

ORDER GRANTING REHEARING, EN BANC

[Caption Omitted]

(Filed October 25, 1967)

*Appeal from the U. S. District Court for the Southern
District of Mississippi*

Before: Brown, Chief Judge; Tuttle, Wisdom, Gewin,
Bell, Thornberry, Coleman, Goldberg, Ainsworth, Godbold,
Dyer and Simpson, Circuit Judges.

By the Court:

The Court on its own motion having determined to re-
hear this case en banc,

It is ordered that the cause shall be reheard by the Court
en banc with oral argument on a date hereafter to be fixed.
The Clerk will specify a briefing schedule for the filing of
supplemental briefs.

OPINION OF COURT OF APPEALS

[Caption Omitted]

(Filed Oct. 9, 1969)

Concurring Opinion Jan. 7, 1970.

Dissenting Opinion Nov. 25, 1969.

(Appearing in 419 F.2d 1222)

RIVES, Circuit Judge:

The briefs and arguments on rehearing en banc have
been confined to the first point discussed in the original
opinion; that is, to whether the City of Jackson denied
the equal protection of the laws to Negroes by the closing

of all of its public swimming pools. The findings of fact by the district court on this point were set forth in the original opinion, and, for convenience, are again quoted:

"The City of Jackson closed all swimming pools owned and operated by it in 1963, following the entry of a declaratory judgment by this Court in the case of *Clark v. Thompson*, 206 F. Supp. 539, affirmed 313 F.2d 637, cert. den. 376 U.S. 951, 84 S.Ct. 440, 11 L.Ed 2d 312. No municipal swimming facilities have been opened to any citizen of either race since said time, and the City Council does not intend to reopen or operate any of these swimming facilities on an integrated basis. The personal safety of the citizens of the City and the maintenance of law and order would be endangered by the operation of public swimming pools on an integrated basis. These pools could not be economically operated in that manner. Although closed, the swimming facilities owned by the City are being properly maintained. In addition to closing the swimming facilities owned by it, the City cancelled its lease covering the Leavell Woods swimming pool in 1964."

On this rehearing we would observe the admonition of the Supreme Court that "generalizations do not decide concrete cases. 'Only by sifting facts and weighing circumstances' (*Burton v. Wilmington Parking Authority*, *supra* [365 U.S. 715], at 722 [81 S.Ct. 856, 6 L.Ed.2d 45]) can we determine whether the reach of the Fourteenth Amendment extends to a particular case." *Evans v. Newton*, 1966, 382 U.S. 296, 299, 300, 86 S.Ct. 486, 488, 15 L.Ed.2d 373.¹ So doing, we search for further facts and circumstances.

¹ To like effect, see *Reitman v. Mulkey*, 1967, 387 U.S. 369, 378, 87 S.Ct. 1627, 18 L.Ed2d 830.

First, it should be noted that the district Court's findings were entered on the hearing of the plaintiffs' application for a temporary injunction. Thereafter the parties stipulated:

" * * * that this action be and the same is hereby submitted to the Court for final decision on the merits on the complaint, answer, and affidavits heretofore filed and submitted by the parties, and on the full and complete hearing heretofore afforded the parties, at which all parties had an opportunity to offer any and all evidence desired, and on this Court's letter opinion filed herein dated September 14, 1965, and on this Court's separate findings of fact and conclusions of law filed herein by this Court in connection with this Court's order overruling plaintiffs' application for a temporary injunction.

"IT IS FURTHER STIPULATED and agreed that a final judgment may be entered herein on the foregoing without further hearing and without the offering of any further or additional evidence herein."

The district Court then, upon the same findings of fact, entered final judgment that the plaintiffs are not entitled to relief. We note particularly that all parties agreed that they have "had an opportunity to offer any and all evidence desired."

In the case of *Clark v. Thompson* cited by the district Court, a declaratory judgment had been entered, "That each of the three plaintiffs has a right to unsegregated use of the public recreational facilities of the City of Jackson." After that decision had been affirmed per curiam by this Court and certiorari denied by the Supreme Court, the zoo, parks, and all recreational facilities except the pools were opened to the use of whites and blacks alike. The pools were closed. The only evidence as to the reasons and

motives for such closing is contained in affidavits of the Mayor and of the Director of the Department of Parks and Recreation. We quote from the Mayor's affidavit:

"Realizing that the personal safety of all of the citizens of the City and the maintenance of law and order would prohibit the operation of swimming pools on an integrated basis, and realizing that the said pools could not be operated economically on an integrated basis, the City made the decision subsequent to the Clark case to close all pools owned and operated by the City to members of both races. The City thereby decided not to offer that type of recreational facility to any of its citizens, and it has not done so and does not intend to reopen any of said pools.

"All other recreational facilities have been completely desegregated and have been made available to all citizens of the City regardless of race."

The Director's affidavit was to the same effect and was supplemented by a second affidavit stating the average annual operating expense and revenue of the pools for the years 1960, 1961 and 1962, from which it appears that there was an average annual loss of \$11,700.00. The affidavit concluded: "that the City of Jackson would suffer a severe financial loss if it attempted to operate said pools, or any of them, on an integrated basis."

True, the City decided to close the pools rather than to operate them on an integrated basis. There was, however, no evidence that it reached that decision in an effort to impede further efforts to integrate. Nor did the Court find any intent to chill or slow down the integration of other recreational facilities. To the contrary, as the Mayor's affidavit states, those were completely desegregated and made available to all citizens of the City regardless of race.

The pools were closed because they could not be operated safely or economically on an integrated basis. Is that a denial of equal protection of the laws?

[1-3] If so, then the plaintiffs must prevail, for " . . . law and order are not . . . to be preserved by depriving the Negro children of their constitutional rights."² Desirable as is economy in government and important as is the preservation of the public peace, "this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the federal Constitution."³ For that principle to be applicable, however, it must be held that the result of closing the pools because they cannot be operated safely or economically on an integrated basis deprives Negroes of the equal protection of the law. In our opinion that simply is not true.

The operation of swimming pools is not an *essential* public function in the same sense as the conduct of elections,⁴ the governing of a company town,⁵ the operation or provision for the operation of a public utility,⁶ or the operation and financing of public schools.⁷

² *Cooper v. Aaron*, 1958, 358 U.S. 1, 16, 78 S.Ct. 1401, 1409, 3 L.Ed.2d 5, 19.

³ *Buchanan v. Warley*, 1917, 245 U.S. 60, 81, 38 S.Ct. 16, 20, 62 L.Ed. 149.

⁴ *Nixon v. Condon*, 1932, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984; *Smith v. Allwright*, 1944, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987; *Terry v. Adams*, 1953, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152.

⁵ *Marsh v. Alabama*, 1946, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265.

⁶ *Public Utilities Com'n of District of Columbia v. Pollak*, 1952, 343 U.S. 451, 72 S.Ct. 813, 96 L.Ed. 1068; *Burton v. Wilmington Parking Authority*, 1961, 365 U.S. 715, 724, 81 S.Ct. 856; *Boman v. Birmingham Transit Co.*, 5 Cir. 1960, 280 F.2d 531; *Baldwin v. Morgan*, 5 Cir. 1961, 287 F.2d 750, 755.

⁷ *Brown v. Board of Education*, 1954, 347 U.S. 483, 493, 74 S.Ct. 686, 98 L.Ed. 873; *Guillory v. Administrators of Tulane University*, E.D.La. 1962, 203 F. Supp. 855, 859, 863; *Hobson v. Hansen*, D.D.C. 1967, 269 F.Supp. 401.

Under the impetus of the declaratory judgment in *Clark v. Thompson, supra*, the City was making the transition in the operation of its recreational facilities from a segregated to an integrated basis. It had considerable discretion as to how that transition could best be accomplished. Local authorities have the duty of easing the transition from an unconstitutional mode of operation to one that is constitutionally permissible. That has been held true as to the reapportionment of the state legislative bodies⁸ and as to the desegregation of the public schools.⁹ The Constitution does, however, require that the end result be constitutionally permissible.

The equal protection clause is negative in form, but there is no denying that positive action is often required to provide "equal protection." That is frequently true as to essential public functions. Other functions permit more latitude of action. As to swimming pools, which a city may furnish or not at its discretion, it seems to us that a city meets the test of the equal protection clause when it decides not to offer that type of recreational facility to any of its citizens on the ground that to do so would result in an unsafe and uneconomical operation.

There is, of course, no constitutional right to have access to a public swimming pool. No one would question that proposition in circumstances having no racial overtones; as, for example, where all citizens of a municipality

⁸ *Reynolds v. Sims*, 1964, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 505.

⁹ *Brown v. Board of Education*, 1954, 347 U.S. 483, 74 S.Ct. 686; *Shuttlesworth v. Birmingham Board of Education*, N.D. Ala. 1958, 162 F.Supp. 372, 379, 381, *aff'd* 358 U.S. 101, 79 S.Ct. 221, 3 L. Ed.2d 145.

are of the same race, the closing of all municipal pools would embody no unconstitutional action or result.¹⁰

Attempts to analogize this case to *Reitman v. Mulkey*, 1967, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 and *Griffin v. County School Board of Prince Edward County*, 1964, 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256, offer little assistance. In *Reitman*, the Court held unconstitutional a recently adopted state constitutional amendment which declared that no agency of the state could interfere with the right of a property vendor or lessor to sell, rent or lease to anyone he chose. Considering the "purpose, scope, and operative effect" of the amendment, the Court stated that by, in effect, nullifying existing fair-housing laws, the state had adopted an affirmative policy of encouraging private discrimination. Significantly state involvement in the private housing market, by prior regulation of fair-housing practices, supported the Court's conclusion. This case offers no circumstances involving the regulation of private activity, the abandonment of which can be transmuted into discriminatory state action. It is significant further that the subject facility here, public in nature, has ceased to exist, whereas the private facilities in *Reitman*, by their very identity and nature, of necessity continued to exist. The possibility that private pool owners in Jackson may operate segregated pools henceforth does not indicate any such state involvement in the past, present or future as could possibly require the application of the *Reitman* principles here.

¹⁰ Arguments related to a due process or impairment of contract theory were foreclosed to plaintiffs by such cases as *Hunter v. Pittsburgh*, 1907, 207 U.S. 161, 177, 178, 28 S.Ct. 40, 52 L.Ed. 151. See in this regard, *Gomillion v. Lightfoot*, 1960, 364 U.S. 339, 342-343, 81 S.Ct. 125, 5 L.Ed.2d 110.

In *Griffin*, the Court held as a violation of the equal protection clause the closing of all of the public schools of Prince Edward County, Virginia. The Court predicated its decision on two factors. Noting that none of the other counties in Virginia had closed their schools,¹¹ the Court pointed out that the state and county were supporting private, segregated schools with public funds, to the effect that, excluding one temporary expedient, "Prince Edward County school children, if they go to school in their own county, must go to racially segregated schools which, although designated as private, are beneficiaries of county and state support." 377 U.S. at 230-231, 84 S.Ct. at 1233. Pretermitting the question of swimming facilities available in other parts of Mississippi, on which there is no evidence, we see no involvement here of public funds applied to maintain any private swimming facilities.

The plaintiffs rely also on *Evans v. Newton*, 1966, 382 U.S. 296, 86 S.Ct. 486, but we do not think that case analogous. There the Court found that the public character of a purportedly private park required the park to be treated "as a public institution subject to the command of the Fourteenth Amendment." 382 U.S. at 302, 86 S.Ct. at 490. "We only hold that where the tradition of municipal control had become firmly established, we cannot take judicial notice that the mere substitution of trustees instantly transferred this park from the public to the private sector." 382 U.S. at 301, 86 S.Ct. at 489. In the case at bar, of course, there may well be inferred a "tradition of municipal control,"

¹¹ On this point, Mr. Justice Black observed that "the Equal Protection Clause relates to equal protection of the laws 'between persons as such rather than between areas'," 377 U.S. at 230, 84 S.Ct. at 1233, but that Virginia law treated "the school children of Prince Edward [County] differently from the way it treats the school children of all other Virginia counties." *Id.*

but there the analogy must end. The city swimming pools in Jackson completely ceased to operate, whereas the park in *Evans v. Newton* continued to operate, with the benefit of continued "municipal maintenance and concern." 382 U.S. at 301, 86 S.Ct. 486.

Appellants have urged a theory other than those suggested explicitly by *Reitman*, *Griffin* and *Evans*. We understood them to argue in terms of a protected right to be a free and equal citizen. We understood counsel in oral argument, as well as by written brief, to state that the issue here is whether the Constitution forbids the City of Jackson from withdrawing a badge of equality. The badge of equality, presumably, was the ability to swim in an integrated municipal swimming pool—the ability to enjoy, in an integrated fashion, recreational facilities operated by a municipality for its citizens. It cannot be disputed that were the badge of equality, here the ability to swim in an unsegregated pool, to be replaced by a badge implying inequality—segregated pools, the municipality's action could not be allowed. However, where the facilities around which revolve the status of equality are removed from the use and enjoyment of the entire community, we see no withdrawal of any badge of equality.

[4, 5] Plaintiffs extend their argument, however, urging that white people in general are more affluent and thus have greater access to private swimming facilities.¹² Therein, it is said, lies a fatal aspect of the alleged re-

¹² One pool formerly leased by the City has subsequently been operated by the local Y.M.C.A. on a white-only basis. There is no evidence however, of any public involvement in the operation of that pool. See, e. g., *Evans v. Newton*, 1966, 382 U.S. 299, 302, 86 S.Ct. 486, citing *Terry v. Adams*, 1953, 345 U.S. 461, 73 S.Ct. 809; *Public Utilities Com'n of District of Columbia v. Pollak*, 1952, 343 U.S. 451, 72 S.Ct. 813; *Marsh v. Alabama*, 1946, 326 U.S. 501, 66 S.Ct. 276.

moval of the badge of equality—plaintiffs, and the class they represent, will continue to suffer unequal treatment as a result of municipal action. In this context, the argument carries little legal significance. The equal protection clause does not promise or guarantee economic or financial equality. In applying the requirements of the equal protection clause, this Court cannot require a city to operate a public swimming pool solely because the city's ceasing to do so forecloses the enjoyment by financially less fortunate citizens of recreational facilities available on a completely private basis to the more affluent.

[6, 7] Motive behind a municipal or a legislative action may be examined where the action potentially interferes with or embodies a denial of constitutionally protected rights. See, *e.g.*, *Griffin v. School Board of Prince Edward County*, *supra*, and *Gomillion v. Lightfoot*, *supra*, n. 10. *Griffin*, *supra*, 377 U.S. at 231, 84 S.Ct. 1226, at 1233, uses the expression that, "Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional." That expression must not be lifted out of context. Read in connection with the attached footnote, the preceding part of the paragraph, and the paragraph which follows, it is clear that the Court was speaking of the kind of abandonment of public schools which would operate to continue racial segregation. We do not read this statement to prohibit the City from taking race into consideration if not for an invidious or discriminatory purpose. The consideration of racial factors has been endorsed in cases of national defense,¹³ the operation

¹³ *Hirabayashi v. United States*, 1943, 320 U.S. 81, 100, 63 S.Ct. 1375, 87 L.Ed. 1774.

of the public schools,¹⁴ and the selection of jurors.¹⁵ In dismissing this complaint, after considering the affidavits and testimony, the district Court found that the City officials acted in the interest of preventing violence and preserving economic soundness to the City's operations. Even though such motive obviously stemmed from racial considerations, we know of no prohibition to bar the City from taking such factors into account and being guided by conclusions resulting from their consideration.

Motivation has been pointed out here as a positive indication of municipal policy. It has been suggested that the City has, in effect, adopted an official position that it would prefer to operate no pools rather than operate unsegregated pools. Without commenting on the soundness of the argument, we recognize that in the face of the substantial and legitimate objects which motivated the City's closing, to wit, the preservation of order and maintenance of economy in municipal activity, no such municipal policy can be inferred from the closing.

We agree with the district Court that plaintiffs were not denied the equal protection of the laws by the closing of these swimming pools.

The judgment is

Affirmed.

JOHN R. BROWN, Chief Judge, and TUTTLE, WISDOM, THORNBERRY, GOLDBERG, and SIMPSON, Judges, dissent, reserving the right to file a dissenting opinion.

¹⁴ *Shuttlesworth v. Birmingham Board of Education*, *supra*, n. 9; see also *Darby v. Daniel*, S.D. Miss. 1958, 168 F.Supp. 170, 186.

¹⁵ *Brooks v. Beto*, 5 Cir. 1966, 366 F.2d 1, 25.

GEWIN, COLEMAN, AINSWORTH, GODBOLD and DYER, Judges, concur.

BELL, Circuit Judge, specially concurring, with whom Circuit Judges RIVES, GEWIN, COLEMAN, AINSWORTH, GODBOLD and DYER join.

The footnote at the beginning of the majority opinion shows that Judge Clayton, now deceased, had concurred on February 5, 1968. Now almost two years later, the dissenting opinion has been filed. The pools in question here were closed in 1963. The suit which forms the subject matter of this appeal was filed in 1965. There was a prompt hearing in the district Court and the judgment appealed from was rendered in 1965. The original panel decision affirming the denial of relief by the district Court was rendered on August 29, 1967. *Palmer v. Thompson*, 5 Cir., 1967, 391 F.2d 324. This is not to attribute the long delay to the parties; it is court produced. In any event, one must wonder what has happened to the pools in the long interim? Are they still in existence? If so, what condition are they in?

The final footnote¹ of the dissenting opinion shows that the differences between the majority and the dissenters are largely factual. The majority opinion had emphasized that "The only evidence as to the reasons and motives for such closing is contained in affidavits of the Mayor and of the Director of the Department of Parks and Recreation." [Majority typed opinion, p. 1225]. The majority opinion also noted particularly that "all parties agreed that they

¹"16 We do not say that city may never abandon a previously rendered municipal service. If the facts show that the city has acted in good faith for economic or other nonracial reasons, the action would have no overtones of racial degradation, and would therefore not offend the Constitution."

had 'had an opportunity to offer any and all evidence desired.' " [p. 1225] With deference, it would appear that the dissenting opinion, in making the finding that the City of Jackson acted in bad faith, simply departs from the record.² There is no record basis for such a finding.

Whether to operate swimming pools, racial discrimination aside, is a matter for the City of Jackson. We can easily surmise, indeed it may not be disputed, that the closings here were racially motivated. Mere racial motivation, however, is not proof of a racially discriminatory purpose in the closing. The presence or absence of such a purpose was and is the real issue. Courts, including federal courts, must travel on proof and there was a failure of proof in this case on the part of plaintiffs. We cannot assume racial discrimination simply from the fact of the closings. Constitutional principles, as important as they are, must nevertheless rest on facts. It may be that on a full hearing a factual base could be developed for the constitutional principles announced by the dissenting opinion. The case is here, however, on affidavits and the necessary factual basis is absent. I, therefore, concur.

WISDOM, Circuit Judge, dissenting, joined by JOHN R. BROWN, Chief Judge, TUTTLE, THORNBERRY, GOLDBERG and SIMPSON, Circuit Judges.

WISDOM, Circuit Judge: I respectfully dissent:

Long exposure to obvious and non-obvious racial discrimination has seasoned this Court. It is astonishing, therefore, to find that half of the members of this Court accept at

² Judge Rives wishes it noted that the City of Montgomery parks, contrary to footnote 14 of the dissenting opinion, are open and have been since 1965. This fact was called to the attention of the court by Judge Rives prior to the filing of the dissenting opinion.

face value the two excuses the City of Jackson offered for closing its swimming pools and wading pools. As found by the district court and blessed in the affirming opinion, these excuses are:

"[1] The personal safety of the citizens of the City and the maintenance of law and order would be endangered by the operation of public swimming pools on an integrated basis.

[2] These pools could not be economically operated in that manner."

In *Griffin v. County School Board of Prince Edward County*, 1964, 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256, the School Board in Prince Edward County, Virginia, motivated by the intention of circumventing a desegregation order, as the City of Jackson was here motivated, closed the public schools in the county. The Supreme Court ordered the schools reopened. Moreover, the Court instructed the district court that it could require the County Supervisors to take the affirmative action of levying taxes to raise funds adequate to reopen and maintain the public school system. There are manifest factual differences between *Griffin* and the case before this Court: public schools in other Virginia counties stayed open; here, all municipal pools in Jackson were closed, although all other municipal recreational facilities were available on a desegregated basis. And there is a difference in the degree of essentiality between public school education and public recreational facilities—although no one today can deny that a city owes an obligation to its citizens to provide reasonably adequate recreational facilities.¹ But the rationale on which *Griffin* rests applies here:

¹ See *Evans v. Newton*, 1966, 382 U.S. 296, 86 S.Ct. 486, 15 L.Ed.2d 45.

Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional. 377 U.S. at 231, 84 S.Ct. at 1233.

I.

A. Over fifty years ago, the Supreme Court demolished an excuse similar to the first excuse the City advances here. In *Buchanan v. Warley*, 1917, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149, the Court invalidated an ordinance of the City of Louisville prohibiting Negroes from occupying houses in blocks where the greater number of houses were occupied by whites, and vice versa. The City urged that the ordinance "will promote the public peace by preventing race conflicts". The Court dismissed this argument with a single sentence: "Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the federal Constitution." Over fifteen years ago, in the second *Brown*² decision, the Supreme Court declared: "[It] should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." 349 U.S. at 300, 75 S.Ct. at 756. Over ten years ago, the Court dealt with a similar argument in the Little Rock school case, *Cooper v. Aaron*, 1958, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5. After quoting *Buchanan v. Warley*, the Court said: "Thus law and order are not here to be preserved by depriving the Negro children of their constitutional rights." In *Watson v. City of Memphis*, 1963, 373 U.S. 526, 83 S.Ct. 1314, 10 L.Ed.2d 529, the City of

² 1955, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083.

Memphis sought to defend a gradual planned transition from segregated to integrated park facilities by asserting that it was necessary "to prevent interracial disturbances, violence, riots, and community confusion and turmoil," 373 U.S. at 535, 83 S.Ct. at 1319. For a unanimous Court, Mr. Justice Goldberg met this contention by asserting that the "compelling answer * * * is that constitutional rights may not be denied simply because of hostility to their assertion or exercise." *Id.*

In *Cooper v. Aaron* the district court found that there was "extreme public hostility" and that there were numerous acts of violence and disorder caused by opposition to desegregation of the schools in Little Rock. Here, there is no past history, only speculation rebutted by the existence of desegregated pools in southern cities.³ The City of Jackson's operation of other public recreational facilities on a desegregated basis indicates that the city's law enforcement officers are able to preserve peace and that the pools were closed not to promote peace but to prevent blacks and whites swimming in the same water.

B. The second reason the City asserts for closing the pools is that "these pools could not be economically operated" on an integrated basis. At about the same time the City closed its pools, it did away with public rest rooms in the Municipal Court Building and removed the benches and tables from the Livingston Park Zoo. We are told in Mayor Thompson's affidavit, "The public rest rooms are not maintained in the Municipal Court Building for the reason that the efficient operation of said building does not permit the furnishing of these facilities for the general public". Perhaps we are also supposed to be-

³As the Court knows, in some cities such as Tallahassee and New Orleans, pools that had been closed have now been reopened.

lieve that benches in Livingston Park were also removed for reasons of economy and efficiency.

A study of the record shows that Jackson, like all cities, does not expect its swimming pools, wading pools, and park benches to be maintained profitably as if each recreational facility were a business independent of the facilities and activities a municipal park offers its citizens.

The Department of Parks and Recreation operates all of the parks and playgrounds in the City of Jackson. The parks have such facilities as swimming pools, wading pools, "kiddie rides", baseball diamonds, tennis courts, and similar attractions. The Department also operates the Municipal Auditorium, College Park (Negro) Auditorium, Community Centers, Municipal golf courses (including a nine-hole *Negro* golf course), Livingston Lake, city concessions, and the City Zoo. As is evident from the affidavit of George Kurts, Director of the Department, and from his itemized list of the numerous activities and facilities the Department maintains, few, if any, of the recreational activities could have been self-supporting.

For several years the pools for whites in Livingston, Battlefield Park, and College Park and the pool for Negroes in College Park had expenses for \$10,000 each against revenues of \$8000 each for the white pools and \$2500 for the Negro pool. In short, the pools had never been operated economically on a segregated basis; nor were the wading pools or park benches. The City charged swimming fees of only ten cents and twenty cents, described by the Director as the "lowest to be found in the country * * * in order to serve as many people as possible."

The swimming pools and wading pools, like benches in Livingston Park, are parts of a large recreation package. In Jackson the operating funds for the Department of Parks and Recreation come from a one mill levy and from

revenue derived from certain operations such as auditorium receipts, pool and lake admissions, golf fees, concessions, kiddie rides, vending machines, and special events. And, as the Director said, "From the General Fund is appropriated supplementary money needed to meet the overall operation of Parks and Recreation".

The district court found that the "City of Jackson closed all swimming pools owned and operated by it in 1963, following the entry of a declaratory judgment [of that] court in the case of *Clark v. Thompson*, 206 F. Supp. 539 requiring integration of the City's swimming and wading pools". This Court affirmed that decision, 313 F.2d 637, and in April 1963 denied a rehearing. May 27, 1963, a committee, representing the Negro community in Jackson, met with Mayor Thompson and other city officials to present their grievances, including a request that the City desegregate its public facilities including parks and swimming pools. According to the uncontradicted affidavit of one of the Negroes present, Mayor Thompson declared that the public policy of the City of Jackson was to continue segregation of the races in the use and operation of city facilities. May 30, 1963, the Jackson Daily News reported Mayor Thompson as having announced, "Public swimming pools would not be opened on schedule this year due to some minor water difficulty". "Minor water difficulty" has disappeared as an excuse for the City's not having opened its pools in 1963 or since. The pools are still closed, except for the pool at Leavell Woods Park. They are being properly maintained—without any off-setting revenues—or were in August 1965, according to Director Kurts.

The Leavell Woods Pool, unlike the other pools, had been leased by the City. Early in 1964 the City cancelled its lease on this pool. The Young Men's Christian Asso-

ciation promptly took over the leasehold and has since operated the pool exclusively for white patrons.

C. The excuse that integrated pools would pose a threat to law and order may have resulted from an honest fear held by the Jackson City Fathers. But this fear does not justify yielding to the community hostility that produces it. Yielding puts a premium on violence disorder, and further community resistance.

The excuse that the City of Jackson closed its swimming and wading pools because they could not be operated profitably is frivolous.

The City's action in closing its pools must stand or fall on a city's right to close a recreational facility on the "grounds of race and opposition to desegregation".

II.

A. My affirming brothers could not have been entirely satisfied with the reasons the City put forth for closing the swimming pools and wading ponds. They rely heavily as did the district court, on the argument that the act operated equally on Negroes and whites. They say:

"It cannot be disputed that were the badge of equality, here the ability to swim in an unsegregated pool, to be replaced by a badge implying inequality—segregated pools, the municipality's action could not be allowed. However, where the facilities around which revolve the status of equality are removed from the use and enjoyment of the entire community, we see no withdrawal of any badge of equality."

This is a tired contention, one that has been overworked in civil rights cases. In *Griffin* the public school facilities of Prince Edward County were "removed from the use

and enjoyment of the entire community". There too the public officials argued that tuition grants as well as closing the schools, applied equally to Negroes and whites. Nevertheless the Supreme Court held that this retreat from the operation of a public facility could not be justified on grounds of race and opposition to desegregation.

In *Loving v. Virginia*, 1967, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed2d 1010, the State argued that its miscegenation statutes punish equally both the Negro and white participants in an interracial marriage. The Supreme Court "reject[ed] the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classification from the Fourteenth Amendment's proscription of all invidious racial discrimination". In *Anderson v. Martin*, 1963, 375 U.S. 399, 84 S.Ct. 454, 11 L.Ed. 2d 430, the State defended a statute requiring that in all elections the nomination papers and ballots should designate the race of candidates. The State argued that Act was "nondiscriminatory because the labeling provision applies equally to Negro and white". The Court held that in fact the State was attempting to encourage its citizens to vote for a candidate solely on the ground of race. "Race is the factor upon which the statute operates and its involvement promotes the ultimate discrimination which is sufficient to make it invalid." In *Hamm v. Virginia State Board of Elections*, E.D.Va.1964, 230 F.Supp. 156, aff'd *Tancil v. Woolls*, 379 U.S. 19, 85 S.Ct. 117, 13 L.Ed.2d 91 (1964), the Virginia law under attack required that lists of voters and property tax assessments be kept separately for each race. The Negroes attacking the statutes demonstrated no measureable inequality or discriminatory effect. Nonetheless the Court summarily affirmed the district court's holding the law unconstitutional.

In cases such as *Loving v. Virginia*, *Aanderson v. Martin*, and *Hamm*, the statute may have applied equally to Negroes and whites but that fact was irrelevant because race was the factor upon which the statute operated, just as race was the factor that led the City of Jackson to close its pools.

Measurable inequality was not the basis for the Supreme Court's per curiam decisions that applied *Brown* to public parks⁴ and beaches,⁵ municipal theatres⁶ and golf courses,⁷ busses⁸ and courtrooms.⁹ In these cases the central vice in the unlawful state action was the forced display of a racial badge of inferiority. As the first Justice Harlan put it: "[Segregation statutes] in fact proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens * * *."¹⁰ Just as certainly as did the Jim Crow law considered in *Plessy v. Ferguson*, the swimming pool closing proceeds on the ground that

⁴ *New Orleans City Park Development Ass'n v. Detiege*, 1958, 358 U.S. 54, 79 S.Ct. 99, 3 L.Ed.2d 46.

⁵ *Dawson v. Mayor and City Council of Baltimore City*, 1955, 350 U.S. 877, 76 S.Ct. 133, 100 L.Ed. 774.

⁶ *Muir v. Louisville Park Theatrical Ass'n*, 1954, 347 U.S. 971, 74 S.Ct. 783, 98 L.Ed. 1112; *Schiro v. Bynum*, 1964, 375 U.S. 395, 84 S.Ct. 452, 11 L.Ed.2d 412.

⁷ *Holmes v. City of Atlanta*, 1955, 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 776.

⁸ *Gayle v. Browder*, 1956, 352 U.S. 903, 77 S.Ct. 145, 1 L.Ed.2d 114.

⁹ *Johnson v. Virginia*, 1963, 373 U.S. 61, 83 S.Ct. 1053, 10 L.Ed.2d 195.

¹⁰ *Plessy v. Ferguson*, 1896, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256.

Negroes are "so inferior and degraded that they cannot be allowed" to use public swimming pools with white people.

In this case, however, and in *Griffin* the equal application argument rests on the fallacious assumption that closing a public facility has the same effect on both Negroes and whites. Closing the schools in Prince Edward County had a conspicuously greater effect on Negro children than on white children. As Justice Black said:

Closing Prince Edward's schools bears more heavily on Negro children in Prince Edward County since white children there have accredited private schools which they can attend, while colored children until very recently have had no available private schools,, and even the school they now attend is a temporary expedient. (377 U.S. at 230, 81 S.Ct. at 1233).

Here, too, closing the pools in Jackson "bears more heavily on the Negro children". Many white children in Jackson have the opportunity of swimming in country club pools or in pools owned by private persons or in pools operated at summer camps; all may swim in the Leavell Woods Pool. Few, if any Negroes in Jackson have access to a swimming pool.

In *Hall v. St. Helena Parish School Board*, E.D.La.1961, 197 F.Supp. 649, 655, aff'd 368 U.S. 515, 82 S.Ct. 529, 7 L.Ed.2d 521 (1962), the court said:

"to speak of this law [closing the schools and providing tuition grants for students attending private schools] as operating equally is to equate equal protection with the equality Anatole France spoke of: "The law, in its majestic equality, forbids the rich as

well as the poor to sleep under bridges, to beg in the streets, and to steal bread."¹¹

B. The affirming opinion dismisses the subject of the Leavell Woods Community Park pool with the brief statement in a footnote that "There is no evidence, however, of any public involvement in the operation of that pool". After the city cancelled its lease of the pool the Negroes in Jackson suffered the humiliation of seeing the Young Men's Christian Association operate the pool for whites only. This is exactly the kind of badge of inferiority my brothers refer to as impermissible. The City's withdrawal from performing a recreational function in favor of a private, segregated operation of the same facility is similar to the State's involvement in private discrimination condemned in *Burton v. Wilmington Parking Authority*, 1961, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45. In *Burton* the Supreme Court found that the State of Delaware had elected to place its power and prestige behind the admitted discrimination against Negroes by a private restaurant in a state-owned building.

III.

We turn now to the decisions which support the plaintiffs' position.

"[A]cts generally lawful may become unlawful when done to accomplish an illegal end and a constitutional power can not be used by way of condition to attain an unconstitutional result." *Western Union Telegraph Co. v. Foster*, 1918, 247 U.S. 105, 38 S.Ct. 438, 62 L.Ed. 1006. When, as in this case, a city closes a public facility for the purpose of avoiding a desegregation order and when the necessary effect of the city's retreat or withdrawal is to discriminate against

¹¹ Anatole France, *Le Lys Rouge*, Ch. VII (1894).

Negroes the otherwise lawful closure becomes unlawful.¹²

In *Evans v. Newton*, 1966, 382 U.S. 296, 86 S.Ct. 486, 15 L.Ed.2d 373, the City of Macon, Georgia, was trustee for Bacon's Park, a park open only to white persons. The Court held that the City could not resign as trustee, abandoning the park as a public activity, to avoid integration. "A park * * * is more like a fire department or a police department that traditionally serves the community." 382

¹² The City's argument fails to take account of the crucial distinction between the state's failure to institute a new service and its abandonment of a service it formerly provided. There are many things a state chooses not to do. When a state simply does not create one new program, or another, there is no change in the status quo. There is not "action" which could have a discriminatory impact. But when a state discontinues an existing service, clearly there is "action", and the action may well be a vehicle for discrimination. Practical as well as theoretical considerations dictate a distinction between the failure to establish a service and the abandonment of an existing one. Most important is the impact on the individual citizens. When a service has never existed there is no action to bring the state's animus home to those against whom it is directed. There is nothing to focus a generalized discriminatory atmosphere into a stinging rebuke. The impact is naturally much sharper when the state expresses its animus by taking away a previously enjoyed privilege. Then the state's discrimination is concentrated in an identifiable act. The rebuke is felt.

From the viewpoint of the city, also, it is more practical for a court to forbid the abandonment of a service than to order its original establishment. In the former case, facilities already exist, policies have been formulated, and the city already has an operative system of administration. In the latter case, the entire program must be constructed. Finally, it is more consonant with the traditional function of courts to enjoin abandonment than order a city to create and adopt an entirely new program.

In *Gomillion v. Lightfoot*, for example, the Court based its decision, at least in part, on the ground that the Alabama gerrymander deprived the Negro plaintiffs of something they had previously enjoyed—their "pre-existing municipal vote". 364 U.S. at 341, 81 S.Ct. 125.

U.S. at 302, 86 S.Ct. at 490. *Evans* is not distinguishable from the instant case. Considering the parks as a whole or the public recreational activities as a package, the City of Jackson should no more be allowed to abandon one phase of public recreation to avoid desegregation than the City of Macon was allowed to turn over Bacon's Park to private trustees. As the Court noted, "Mass recreation through the use of private parks is plainly in the public domain."¹³ 382 U.S. at 302, 86 S.Ct. at 490 Bacon's Park in Macon would have ceased to exist too, as far as the City was concerned and as far as Negroes could use it, but for the Court's decision refusing to allow the City to retreat from its responsibility.

The Girard College case is another example of the principle that a city cannot by retreating avoid desegregating a facility. In *Commonwealth of Pennsylvania v. Board of Directors of City Trusts of the City of Philadelphia*, 1957, 353 U.S. 230, 77 S. Ct. 806, 1 L.Ed. 2d 792 the Supreme Court held that Girard College regardless of the language of the trust limiting students to white students should be desegregated. The Orphans' Court of Pennsylvania removed the City of Philadelphia as trustee and installed private persons as trustees. The Court of Appeals held that the state could not withdraw; the appointment of private trustees to continue operation of the college was unconstitutional state action. *Commonwealth of Pennsylvania v. Brown*, 3 Cir 1968, 392 F.2d 120, 25 A.L.R.3d 724.

Thus in both these cases, as in the instant case, the city government tried to escape desegregating a facility by terminating the city's connection with the facility. The

¹³ Citing *Watson v. Memphis*, 373 U.S. 526, 83 S.Ct. 1314, 10 L.Ed.2d 529.

only difference here is that the method used to accomplish the objective was closing the pools rather than withdrawing as trustee. But it is just as wrong to close public facilities for racial reasons as it is to operate them on a racial basis. In each case race is the dominant factor guiding the decision.

In *Reitman v. Mulkey*, 1967, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 the Supreme Court affirmed a California decision holding unconstitutional an amendment to the California Constitution, approved by the voters, repealing existing open housing laws and forbidding the State's interfering in the future with the absolute right of any person to sell or lease his property to any person. The amendment was neutral on its face and could be said to operate equally on Negroes and whites. The Court held that the amendment was discriminatory; that "even where the State can be charged only with encouraging rather than commanding discrimination", there was prohibited state involvement.

To find state discrimination the Court used the "three factor test" which the California Supreme Court enunciated: (1) "The historical context and the conditions existing prior to its enactment", (2) its "immediate objective", that is, its "immediate design and intent", and (3) its "ultimate effect". Applying the first factor, this Court is so familiar with the historical context and the conditions existing in Mississippi at the time the Jackson pools were closed that it is necessary only to quote from a case we decided in May 1963: "We again take judicial notice that the State of Mississippi has a steel-hard, inflexible, undeviating, official policy of segregation." *United States v. City of Jackson*, 5 Cir. 1963, 318 F.2d 1. Second, the immediate objective in closing the public pools was to avoid complying with the desegregation order issued in

Clark v. Thompson. Third, for white persons the first effect of closing the pools was to encourage private enterprise to supply segregated pools for white patrons. For Negroes the first effect was punitive: they were denied the opportunity of using even their segregated pool. The ultimate effect is to encourage segregation to the detriment of Negroes. All public recreational facilities are now in jeopardy.

In *Hunter v. Erickson*, 1969, 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616, the City of Akron, Ohio, amended its charter to prevent the city council enacting any ordinance dealing with racial, religious, or ancestral discrimination in housing without the approval of a majority of voters. The Court found that this was a denial of equal protection in that "Only laws to end housing discrimination based on 'race, color, religion, national origin or ancestry' must run § 137's gauntlet." There again the City argued that all groups were treated equally. The Court said, "Moreover, although the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority." Thus, as in *Reitman* the court regarded the actual impact on minority groups as controlling rather than the apparent neutrality of the law.

Federal courts are used to comparable situations in the field of labor law. Time and again this Court has had to determine whether an employee was discharged for good reason, for no reason, or on account of the employee's labor union activity. In *Textile Workers of America v. Darlington Manufacturing Company*, 1965, 380 U.S. 263, 85 S.Ct. 994, 13 L.Ed.2d 827, the defendants owned several plants, in one of which employees sought to organize for collective bargaining. The defendants closed the plant in question shortly after the

employees voted in favor of unionization. The Supreme Court remanded the case to the NLRB for a factual determination of the purpose and effect of closing the plant. The company could go out of business entirely, but closing one plant was an unfair labor practice, if motivated by a purpose to chill unionism in any of the remaining plants. Here there can be no doubt of the chilling effect the closing of Jackson's pools had on the Negroes who presented their grievances to Mayor Thompson and on all Negroes using the parks and other public facilities. Negroes in Jackson are now on notice that a petition to redress grievances may lead to a change for the worse.

Gomillion v. Lightfoot, 1960, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed. 2d 110, involved another situation where the factual effect of racially motivated action was determinative of unconstitutionality. The Alabama legislature had redrawn the boundaries of the City of Tuskegee to exclude most of the Negro voters. The legislature has broad authority to fix and from time to time alter municipal borders. But state authority is not insulated from judicial control "when state power is used as an instrument for circumventing a federally protected right". 364 U.S. at 347, 81 S. Ct. at 130. In many cases, said Justice Frankfurter, the Court has "prohibited a State from exploiting a power acknowledged to be absolute in an isolated context". The Court held that the Fifteenth Amendment negated the state's power to redraw boundaries that did away with the Negroes' pre-existing right to vote in municipal elections.

The closing of the City's pools has done more than deprive a few thousand Negroes of the pleasures of swimming. It has taught Jackson's Negroes a lesson: In Jackson the price of protest is high. Negroes there now know that they risk losing even segregated public facilities if

they dare to protest segregation. Negroes will now think twice before protesting segregated public parks, segregated public libraries, or other segregated facilities. They must first decide whether they wish to risk living without the facility altogether, and at the same time engendering further animosity from a white community which has lost its public facilities also through the Negroes' attempts to desegregate these facilities.

The long-range effects are manifold and far-reaching. If the City's pools may be eliminated from the public domain, parks,¹⁴ athletic activities, and libraries also may be closed. No one can say how many other cities may also close their pools or other public facilities. The City's action tends to separate the races, encourage private discrimination, and raise substantial obstacles for Negroes asserting the rights of national citizenship created by the Wartime Amendments.

We should not be misled by the equal-application argument. That argument smacks of the repudiated separate-but-equal doctrine of *Plessy v. Ferguson*. We should not be misled by focusing on the city's non-operation of the pools. Closing the pools as an official act to prevent Negroes from enjoying equal status with whites constituted the unlawful state action. It had the same purpose and many of the same effects as maintaining separate pools.

We should recognize the actual traumatic impact of the action on Negroes for what it was. It was a reaffirmation of the *Dred Scott* article of faith that Negroes are indeed

¹⁴ The City of Montgomery closed its parks January 1, 1959. They are still closed. A panel of this Court held that it was "a matter committed to the wisdom of the members of the Board of Commissioners and is not subject to review by the Court in the absence of some violation of the Constitution of the United States." *City of Montgomery v. Gilmore*, 5 Cir. 1960, 277 F.2d 364.

"a subordinate or inferior class of beings, who had been subjugated by the dominate race" and are not members of the "people of the United States".¹⁵ This is the badge of servitude, the sign of second-class citizenship, the stigma that the Thirteenth, Fourteenth, and Fifteenth Amendments were designed to eradicate.¹⁶

ADDENDUM

I err in saying that the public parks in Montgomery, which the City closed in 1959, are still closed. See footnote 2 of Judge Bell's opinion. As a matter of fact, since 1965 anyone may enjoy the trees, the flowers, the scenic beauty of the parks. But visitors to Montgomery's parks will find no animals in the City Zoo and no water in the public swimming pools.

¹⁵ *Dred Scott v. Sanford*, 1857, 69 U.S. (19 How.) 393, 15 L.Ed. 691.

¹⁶ We do not say that a city may never abandon a previously rendered municipal service. If the facts show that the city has acted in good faith for economic or other nonracial reasons, the action would have no overtones of racial degradation, and would therefore not offend the Constitution.

COURT OF APPEALS

Fifth Circuit

No. 23841

JUDGMENT ON REHEARING, EN BANC

[Caption Omitted]

(Filed October 9, 1969)

This cause came on to be heard on rehearing en banc with oral argument;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the panel of this Court is affirmed.

Chief Judge Brown; Judges Tuttle, Wisdom, Thornberry, Goldberg, and Simpson, dissent reserving the right to file a dissenting opinion.

Judges Gewin, Coleman, Ainsworth and Dyer concur.

Judge Bell concurs in the result and specially reserving the right to file a concurring opinion.

October 9, 1969

Issued as Mandate: Nov. 3, 1969

Supreme Court of the United States

No. 1289 -----, October Term, 19 69

Hazel Palmer et al.,

Petitioners,

v.

**Allen C. Thompson, Mayor, City of
Jackson, et al.**

ORDER ALLOWING CERTIORARI. Filed April 20 ----- 19 70.

The petition herein for a writ of certiorari to the United States Court of Appeals for the **Fifth** -----, Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

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1289

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

HAZEL PALMER, et al.,
Petitioners

vs.

ALLEN C. THOMPSON, Mayor, City of Jackson, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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 comments. The nineteenth part is devoted to some
 suggestions. The twentieth part is devoted to some
 conclusions.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1969

HAZEL PALMER, et al.,
Petitioners,

vs.

ALLEN C. THOMPSON, Mayor, City of Jackson, et al.,
Respondents.

**PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH
CIRCUIT**

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming an order of the United States District Court for the Southern District of Mississippi (Jackson Division) denying injunctive relief to the petitioner, who sought to reopen public swimming facilities closed by the respondents as a result of a Federal Court Order integrating those facilities.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, en banc, has not been reported but is set forth in Appendix A to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on October 9, 1969. Mr. Chief Justice Warren Burger extended the time in which to file this Petition to and including March 8, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I.

Where the City of Jackson, Mississippi, has historically maintained a steel hard, inflexible, undeviating official policy of segregation and where this policy has been manifested, among other ways, by denying blacks access to public swimming facilities provided for whites and where, as a result of legal action brought by black citizens of Jackson, the Federal Court has ordered these facilities to be operated only on an integrated basis, did the City's action in closing these swimming facilities to avoid the integration order violate rights guaranteed the black people of Jackson under the Thirteenth Amendment and Fourteenth Amendment?

II.

Were the rights of the Petitioners to sue guaranteed by 42 U.S.C. §1981 presently infringed and threatened in the future when the City of Jackson closed all its public swimming pools in response to a successful law suit brought by blacks to integrate the facilities with the resultant effect that blacks have lost all public pools and in the future must weigh their constitutional right to integrated public facilities against the possibility that successful integration law suits will result in deprivation of the facility?

STATUTORY PROVISION INVOLVED

United States Code, Title 42

§1981. *Equal rights under the law*

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

A federal district court, under the commandment of the Constitution, as well as many opinions from this Court, ordered that public swimming pools which had been racially segregated, be integrated immediately. Instead, the City of Jackson, Mississippi, closed those pools. While the City's rationalization for this action were safety and economic burden, these excuses could only be construed as arising from the disgust and fear felt by white people with regard to close, intimate contact with blacks. The district court and the Fifth Circuit Court of Appeals upheld this action of the City. This Court must decide whether it will permit black Americans to be dealt with in this manner or whether it will fulfill the promise of its prior opinions and of the Civil War Amendments.

This case represents another attempt by the City of Jackson, Mississippi, to avoid integration, perpetuate and encourage segregation and nullify the purposes and requirements of the Civil War Amendments. In 1962, in the case of *Clark v. Thompson*, 206 F. Supp. 539 (S.D. Miss.—1962) affirmed, 313 F. 2d. 673 (5 C.C.A.—1963), the federal court, in a declaratory judgment action, ordered that the previously segregated Jackson public swimming pools be integrated. In 1963, as a result of this order, the City of Jackson closed all of its public swimming facilities¹ (Affidavit, Mayor Allen Thompson, Appendix B pp. 76-7).

¹ Prior to the closing, the City operated:

4 white-only pools; and

1 black-only pool

(Affidavit, Carolyn Stevens, Appendix B p. 68).

The evidence established that the pool closings were motivated by racial considerations. *Palmer v. Thompson*, (Appendix A p. 43) (See also concurring opinion, Appendix A p. 46) The City of Jackson asserted that the closing of the pools was in response to the integration order but was necessitated because "the maintenance of law and order would be endangered by operation of public swimming pools on an *integrated basis*. These pools could not be economically operated in that manner." (Emphasis added.) (Affidavit, Mayor Allen Thompson, Appendix B pp. 76-77).

While the details were never spelled out as to increased costs and maintenance of law and order, the reasons were barely below the surface. In Mayor Thompson's Affidavit, Appendix B, he proclaims that many public facilities such as auditoriums, parks and playgrounds have been retained in operation on an integrated basis; but the *pools* were not permitted to remain open on an integrated basis. Why not the pools?

First, Mr. Kurt's Affidavit, Appendix B p. 75, states that the black pool, when segregated earned much less money than the four white pools. He then stated that there will be an economic hardship inflicted on the City if black swimmers are tolerated in all the pools. This assumes that white attendance at the pools will so drastically diminish that all the pools will lose money. Thus, without ever attempting to operate the pools as integrated and, rather, intending not . . . "to reopen" or operate any of these swimming facilities on an integrated basis, (Affidavit Mayor Allen B. Thompson, Appendix p. 77) the City concluded that its pools would depopulate because of whites fleeing either in disgust or fear of black swimmers.

Furthermore, if five integrated pools lose money there is nothing in the record to indicate that fewer integrated

pools will also represent an unbearable economic burden. The important point is that no attempt was made to comply with the court's order. This only serves to highlight the lack of good faith on the part of the City in registering these excuses.

Next, the City raises the specter of a breakdown of law and order if the pools are permitted to operate on an integrated basis.² Here again the justification for closing the pools is more of an insult to the petitioners than the closing itself. In the face of demands by black citizens to integrate, they are told that if their race is permitted to "intermingle" (the phraseology is Mayor Thompson's, Carolyn Stevens, Affidavit, Appendix B), criminality will be produced.

Here again we must wonder as to why the pools cannot indulge integrated activities as distinguished from the auditoriums, parks, and playgrounds. The answer can only be that it is the close bodily contact which is so repulsive to that Mayor. It is this fact, never articulated, which is facilely assumed in every action and position taken by the City with regard to these pools. It is this fact, never articulated in the opinions below, which must be confronted by this Court.

However, the cost and safety pretexts were not clearly thought out, detailed and specifically grounded in any factual basis. The decision of the City to prevent its black and white citizens from co-mingling in the same waters was unqualified in scope. Any doubt that the City intended to maintain the separation of the races in perpetuity was

² In fact, if we are to believe the *Kerner Commission Report*, it is the denial of adequate public facilities (among other things) to black people and exclusion because of racial discrimination which breed violence.

dispelled by the Mayor himself when he confessed that the City Council does not intend to reopen or operate any of these swimming facilities on an integrated basis (Affidavit, Mayor Allen Thompson, Appendix B p. 77).

The fact that the City chose to justify the closing of the pools on grounds of cost and safety was merely an attempt to mask the real motivation for the closing: racism. This can be seen most obviously from the uncontradicted Affidavit filed by Carolyn Stevens, Appendix pp. 69, 70, 72, 73. In that Affidavit, the City's opposition to integrating the pools is documented by statements of public officials of the City and the State of Mississippi. These statements, which were never contradicted, are set forth as follows:

"We will do all right this year at the swimming pools,' the Mayor noted. 'but if these agitators keep up their pressure, we would have five colored swimming pools because *we are not going to have any intermingling*. . . .' He said the City now has legislative authority to sell the pools or close them down if they can't be sold."

Jackson Daily News, May 24, 1962, Page 1. Quoting Mayor Allen Thompson (Emphasis added)

Moreover, Ross Barnett today commended Mayor Thompson for his pledge to maintain Jackson's present separation of the races.

Jackson Daily News, May 15, 1963, Page 1.

Thompson said neither agitators nor President Kennedy will change the determination of Jackson to retain segregation.

Jackson Daily News, May 24, 1963. Page 1.

Indeed, it was not the maintenance of integrated public pools but rather their closing which endangered public

safety. After the closing, children, particularly black children, in seeking bathing facilities, found it necessary to swim without supervision in local streams. At the time this action was commenced, at least two black children had been drowned while swimming in Pearl River (Affidavit, Carolyn Stevens, Appendix B p. 71).

In upholding the City's claim that the pools could not be economically operated on an integrated basis, the majority observed that the pools never were operated at a profit. However, it failed to explain why the City was prepared to operate at a loss on a segregated basis, but was fearful of some greater loss margin on an integrated basis. What the additional cost of integration was to be was never specified. Why it would require closing *all* the pools was never detailed. For example, there is no explanation why it would be more costly to maintain the pools which had been previously all black on an integrated basis.

Furthermore, while the majority opinion at least recited the cost of maintenance of the pools (as segregated facilities), no costs were submitted on the maintenance of park benches and washrooms in the municipal building. Yet, when these facilities were ordered integrated, the benches were removed and the washrooms nailed shut (Affidavit, Mayor Allen C. Thompson, Appendix B pp. 77-78).

The first law suit regarding these matters demanded that the pools be integrated. *Clark v. Thompson, supra*. It was then that the pools were closed. After the pools were closed, petitioners filed a complaint seeking a temporary and permanent injunction requiring the City to reopen the pools on an integrated and equal basis. This relief was denied by the United States District Court for the Southern District of Mississippi. The District Court's denial was affirmed by a three-judge panel of the Fifth Circuit Court of Appeals.

Rehearing was granted before the Fifth Circuit Court of Appeals, en banc. The decision of the District Court was affirmed by seven judges, six judges dissenting with Judge Wisdom writing for the dissenters.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW DENIES TO THE BLACK CITIZENS OF JACKSON, MISSISSIPPI, THE RIGHTS GUARANTEED THEM BY THE THIRTEENTH AMENDMENT AND APPROVES AN OFFICIAL POLICY WHICH PERPETUATES THE BADGES AND VESTIGES OF SLAVERY BY DENYING BLACKS INTEGRATED SWIMMING FACILITIES AND THEREBY OFFICIALLY PROCLAIMING PERSONAL AND RACIAL DISGUST FOR YOUR PETITIONERS.

The purpose and object of the Thirteenth Amendment was to establish "universal freedom" for black people and rid them of all vestiges and badges of slavery:

No one can fail to be impressed with one pervading purpose found in all the amendments, laying at the foundation of each, and without which none of them would have been suggested; we mean freedom of the slave race, the security and firm establishment of that freedom and the protection of the newly made freeman and citizen from oppression of those who formerly exercised unlimited dominion over them.

Slaughter House Cases, 16 Wall. 36, 71 (83 U.S., XXI, 394)

In the *Civil Rights Cases*, 109 U.S. 3 (1875), the majority not only reasserted that the Thirteenth Amendment established and decreed "universal civil and political freedom" but held that the amendment was self-executing and prohibited a state from imposing badges of slavery:

In a very able and learned presentation of the cognate question as to the extent of the rights, privileges, and immunities of citizens which cannot rightfully be abridged by state laws under the fourteenth amendment, made in a former case, a long list of burdens and disabilities of a servile character, incident to feudal vassalage in France, and which were abolished by the decrees of the national assembly was presented for the purpose of showing that all inequalities and observances enacted by one man from another, were servitudes or badges of slavery, which a great nation, in its effort to establish universal liberty, made haste to wipe out and destroy. But these were servitudes imposed by the old law, or by long custom which had the force of law, and exacted by one man from another without the latter's consent. *Should any such servitudes be imposed by a state law, there can be no doubt that the law would be repugnant to the fourteenth, no less than to the thirteenth amendment; nor any greater doubt that congress has adequate power to forbid any such servitude from being exacted.*

Civil Rights Cases, supra, at 21 (Emphasis added)

Recently, this Court again examining the Thirteenth Amendment, said:

"By its own unaided force and effect," the Thirteenth Amendment "abolishes slavery and establishes universal freedom." *Civil Rights Cases*, 109 U.S. 3, 20, 3 S. Ct. 18, 28. Whether or not the Amendment *itself* did any more than that—a question not involved in this case—it is at least clear that the Enabling Clause of that Amendment empowered Congress to do much more.

Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968).

Jones raised the question as to whether the Thirteenth Amendment by its own force, as distinguished from Congressional enactments thereunder, forbids any action which maintains the badges and vestiges of slavery. It did not answer the question. In this case, petitioners raise the question again and in this manner: Did the City of Jackson infringe on the promise of "universal freedom" guaranteed to black people by the Thirteenth Amendment when the City, motivated by the desire to avoid integration, closed all its segregated swimming pools rather than integrate them as ordered by the federal court? Petitioners do not assert, for purposes of this argument that the Action of the City violated any federal statute but only that the closing of the pools violated the Thirteenth Amendment.

There is no doubt that the City's action in closing the pools was racially motivated. All the judges on the Fifth Circuit Court sitting en banc found that the closings were racially motivated. *Palmer v. Thompson, supra*, (Appendix A p. 43); concurring opinion (Appendix A p. 46). However, the majority concluded that racial motivation could not be considered in adjudging a denial of a constitutional right. The majority opinion cited *Hirabayashi v. U. S.*, 320 U.S. 81, 100 (1943); *Shuttlesworth v. Birmingham Board of Education*, 162 F. Supp. 372, 379-381, (N.D. Ala. S.D. 1958) affirmed 358 U.S. 101 (1958); and *Brooks v. Beto*, 366 F. 2d. 1, 25 (5 C.C.A., 1966), in support of this proposition. However, the majority's reliance on these decisions in this case is unsound.³

³ In *Hirabayashi*, the Court, in an unheralded opinion and in an era of war time psychology, decided that the War Power established, for the purpose of preventive action, the right of the federal government to take Japanese ancestry into consideration; and that such action was not banned by the Fifth Amendment. However, since the war this

(Continued on next page)

For example, in *Brooks, supra*, the State of Texas, in order to provide a fair and representative cross-section of grand jurors, intentionally sought to select a percentage of the black population to be included in a group from which the jurors would be randomly selected. The Fifth Circuit in *Brooks, supra*, approved the system quoting from Judge Sobeloff in *Wanner v. Arlington County School Board*, 357 F. 2d 452 (4 C.C.A., 1966):

If a school board is constitutionally forbidden to institute a system of racial segregation by the use of artificial boundary lines, it is likewise forbidden to perpetuate a system that has been so in-

(Continued from preceding page)

case has never been cited for the proposition that race or national origin affords an appropriate method for singling out groups for purposes of governmental acts. On the contrary, *Hirabayashi* has been cited by the court for this basic postulate of constitutional law: "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi, supra*, at 100. See: *Oyana v. State of California*, 332 U.S. 633, 645-646 (1947); *Hernandez v. State of Texas*, 347 U.S. 475, 478 (1954).

Nor is *Shuttlesworth* authority for the proposition that a showing of racial motivation alone is insufficient to invalidate a racially motivated governmental action. For in that case, while the three-judge panel refused to find a school placement law to be unconstitutional on its face, it did so because it refused to assume, without evidence, that the State was "racially motivated" in adopting the legislation. Because of the lengthy discussion of motivation, the assumption must be that had racial motivation been proven, the result of that case would have been different. *Shuttlesworth, supra*, at 38.

Since the majority, the concurring opinion, and the dissenters in the present case acknowledge the racial motivation in the City's actions, the teaching of *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218, 231 (1964) cannot be avoided:

Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional.

stituted. It would be stultifying to hold that a board may not move to undo arrangements artificially contrived to effect or maintain segregation on the grounds that this interference would involve "considerations of race" When school authorities, recognizing the historical fact that existing conditions are based on a design to segregate the races, acts to undo these illegal conditions—especially conditions which have been judicially condemned—their effort is not to be frustrated on the grounds that race is not a permissible consideration. This is not the "consideration of race" which the Constitution discountenances.

Brooks v. Beto, supra, at 25.

Unlike the State of Texas in *Brooks*, the City of Jackson was not seeking to "undo" the long standing pattern of segregating swimming pools, but rather to "perpetuate a system" which forbids black to swim with whites and such action is "constitutionally forbidden".

Petitioner finds no creditable authority for the proposition that the City of Jackson's clear racial motivation in closing the pools is not violative of the Constitution. Indeed, this Court has held that "racial motivation" in the refusal to sell real estate is impermissible because it violates federal statutes authorized by the Thirteenth Amendment:

Indeed, even the respondents seem to concede that if Section 1982 (42 U.S.C.) "means what it says"—to use the words of the respondent's brief—then it must encompass *every racially motivated* refusal to sell or rent and cannot be confined to officially sanctioned segregation in housing. * * * Our examination of the relevant history, however, persuades us that Congress meant exactly what it said. (Emphasis added.)

Jones v. Mayer, supra, at 421-422.

A private citizen may not be racially motivated in selling his property because such motivation constitutes a restraint upon "those fundamental rights which are the essence of civil freedom." *Jones, supra*, 441. Surely the same motive is impermissible when the City of Jackson denies blacks access to public swimming pools.

The majority opinion below, while finding that the City was racially motivated in closing the pools, accepted as a constitutionally permissible justification for that action the City's assertion that closing of the pools was necessary because integration would: (1) affect personal safety; and (2) affect the economical operation of the pools.⁴ However, this Court has held that the threat of violence does not constitute a basis for avoiding the requirements of the Constitution:

⁴ It should be noted that the pools never did operate profitably.

Moreover, the majority opinion of the Fifth Circuit Court of Appeals suggests that somehow the City's action in closing the pools may be countenanced because pools are not an essential public function. (Appendix A pp. 38-39). But the Thirteenth Amendment has never been interpreted to mean that a state may maintain the badges of slavery in non-essential functions.

In searching for justification of the City's action in closing the pools, the majority alludes to the proposition that the city was merely seeking some time in "easing the transition from an unconstitutional mode of operation to one that is permissible" (Appendix A pp. 38-39). However, 16 years have elapsed since *Brown* and the time for "deliberate speed" has passed. *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969). Even if the City's closing of the pools could be justified on the basis that this action was taken for purposes of easing the transition of operation of the pools from a segregated to an integrated basis, the facts do not justify such a conclusion, for, as asserted by the City and found by the majority:

(T)he City thereby decided not to offer that type of recreational facility to any of its citizens and it has not done so and does not intend to reopen any of said pools (Appendix A pp. 37, 43-44).

Desirable as this is (public peace) and important as is the preservation of the public peace, this aim cannot be accomplished by law or ordinances which deny rights created or protected by the federal Constitution.

Buchanan v. Warley, 245 U.S. 60, 81 (1917);
Cooper v. Aaron, 358 U.S. 1 (1958)

Moreover, this Court has not allowed the financial cost of integration to be employed as a barrier permitting racial discrimination. *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218, 233, (1964). Thus, the City's racial motivation in closing the pools cannot be constitutionally justified by the excuses that integration would adversely affect the public safety and is not economical.

The closing of the pools, motivated as it was by race, cannot stand the test of the Thirteenth Amendment. This action returns black people to the days of the infamous *Dred Scott v. Sanford* decision, (60 U.S. (19 How.) 393) (1856), which proclaimed that black peoples "wear the mark of inferiority and degradation" (416) so that they would always be "identified in the public mind with the race to which they belonged" (411)—one which was "inferior and degraded." (413-416). It was against this legal backdrop that the Thirteenth Amendment was adopted.

Even though the majority in the *Civil Rights Cases* and *Plessy v. Ferguson*, 163 U.S. 537 (1896) chose to adopt an artificial and discredited distinction between the Civil War Amendments application to "social rights," as distinguished from legal rights, *Strauder v. State of West Virginia*, 100 U.S. 664 (1879); *Ex parte Virginia*, 100 U.S. 667 (1880), this Court did assert that the Thirteenth Amendment by its own force and without legislation established "universal freedom" and abolished all servitude and badges thereof.

Plessy and its distinctions are discredited. *Brown v. Board of Education*, 347 U.S. 483 (1954). The Thirteenth Amendment is no longer a dead letter. *Jones, supra*, and *Sullivan v. Little Huntington Park, Inc.*, 396 U.S. 229 (1969).

What the City of Jackson has proclaimed in its action of closing the pools is its marked dislike for black people: i.e., in response to a class action by black citizens seeking integration of the pools, the City has chosen to deprive everyone of the right to use the pools rather than to subject whites to what it considers impermissible—contact with blacks. It is difficult to imagine a more deliberate affront to the guarantee of “universal freedom” for blacks or a more insulting continuation of the badges of slavery prohibited by the Thirteenth Amendment.

To close the pools, rather than to integrate them, could have no less effect upon blacks than separation of blacks and whites in public schools. It would likewise “generate(s) a feeling of inferiority as to their state in the community that may affect their hearts and minds in a way unlikely ever to be undone.” *Brown, supra*, at 494. In Jackson, blacks never did, do not now, and are unlikely in the foreseeable future to swim with whites in public swimming pools. This “arbitrary separation of the citizens on the basis of race . . . is a badge of servitude wholly inconsistent with the civil freedoms and the equality before the law established by the Constitution.” *Plessy, supra*, J. Harlan dissenting at 562.

It is indeed ironic that the logical conclusion of this Court's opinion in *Brown* is that black citizens of the City of Jackson now have no swimming facilities whereas, prior to the integration order, there was at least one segregated pool available. (c.f. *Evans v. Abney*, 396 U.S. , 90 S. Ct.

628 (1970). Thus, the doctrine of integration promoted and promulgated by this Court has become enlisted in the strategy of the respondents to deprive the petitioners of *any* swimming facilities. What this Court must decide is whether it will permit its opinions to be used in such a way.

2. THE DECISION OF A MAJORITY OF JUDGES ON THE FIFTH CIRCUIT COURT OF APPEALS PERMITTING THE CITY OF JACKSON TO CLOSE ITS POOLS RATHER THAN INTEGRATE THEM HAS THE EFFECT OF NULLIFYING THE PURPOSES OF THE FOURTEENTH AMENDMENT BECAUSE IT RESTRICTS BLACK PEOPLE TO A SYSTEM WHEREBY ACCESS TO ANY PUBLIC FACILITY MAY BE DENIED SOLELY ON ACCOUNT OF THE RACE.

It is the City's claim that the "equal protection" clause is satisfied because both blacks and whites now find that the public pools are equally unavailable to them.³ This claim, approved by the District Court and a majority of judges on the Fifth Circuit, nullifies the purpose of the Fourteenth Amendment and subverts the decisions of this Court in dealing with the Amendment. *Brown v. Board of Education, supra*. Blacks who had been degraded by slavery, called chattels by the *Dred Scott* court, and systematically excluded from white society, had every right to believe that the *Brown, supra*, decision enhanced their claim to becoming a part of a free society. Yet, as a majority of judges on the Fifth Circuit would have it, *Brown* means that while blacks have the right to integrate existing public facilities they are powerless when these same facilities are

³ At least one private pool is operated on a "white-only" basis. This occurred as a result of the City returning a leased pool (Leavel Wood) to the Y.M.C.A. at the same time all the other pools were closed. Affidavit, Carolyn Stevens. Appendix p. 70.

closed because they sought to integrate them. What this means is that blacks may be forced to endure one of two unacceptable results: Not seek integration and thus have the use of a facility on a segregated basis, or seek to integrate a facility and risk that the facility will be closed because they have attempted to integrate it. Such an anomaly denies the promise of "freedom" established in the Civil War Amendments and result in "invidious discrimination" against them.

The majority opinion below asserts that closing the pools *affects* both black and white equally. This assertion overlooks the whole history of racial discrimination in this country and is fundamentally incorrect, for it assumes that black and white people start off equally. As far back as 1879, the court recognized that the mere assertion that blacks and whites are equal does not establish equality:

At the time when they were incorporated (War Time Amendments) into the Constitution, it required little knowledge of human creatures to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that state laws might be used to perpetuate the distinctions that had before existed. Discrimination against them had been habitual. It was well known that, in some states, laws making such discrimination then existed, and others might be expected. The colored race, as a race, was subject and ignorant, and in that condition unfit to command the respect of those who had superior intelligence. Their training had left them mere children, and as such, they need the protection which a wise government extends to those unable to protect themselves. They especially needed protection against unfriendly action in states where they were residents. It was in view

of these considerations the Fourteenth Amendment was framed and adopted.

Strauder, supra, at 665

But, when the court in *Plessy, supra*, turned away from *Strauder*, and Justice Harlan, dissenting, foresaw the inevitable result:

The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and initiating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat beneficent purposes which the people of the United States had in view when they adopted the recent amendments to the constitution, by one of which blacks of this country were made citizens of the United States. . . . The destinies of the two races in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, then state enactments which, in fact, proceed on the grounds that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens?

Plessy, supra, at 560

What Justice Harlan so accurately predicted would be the result of the "separate but equal doctrine"⁸ is also the

⁸ The Jackson swimming pool situation is a good example of the causative relationship between the separate but equal doctrine and the perpetuation of "distrust between the races." While the population of the City of Jackson is 2/3 white and 1/3 black, of the five public pools in operation on a segregated basis, only one was for the use of black people. (Affidavit, Carolyn Stevens, Appendix B p. 68).

inevitable result of the doctrine of achievement of equality by the use of facilities as "equally unavailable" announced by the majority below.⁷

Since *Brown, supra*, this court on numerous occasions has struck down attempts to encourage or perpetuate segregation despite the fact that the actions taken, on their face, appeared to apply equally to all races. In *Griffin v. County School Board of Prince Edward County, supra*, the county, motivated by the intention of circumventing a desegregation order, closed all of its schools. This court, in ordering the reopening of the schools, held that the county's objective in closing the schools could never be constitutional where it was based on "grounds of race and opposition to desegregation." *Griffin, supra*, at 231.

In *Reitman v. Mulkey*, 387 U.S. 369 (1967), this court affirmed a decision of the California Constitution repealing open housing laws. The amendment, on its face, applied equally to all citizens of California. In affirming the California Court's decision this Court affirmed a three-pronged test employed by the California Supreme Court to determine the amendments validity under the Fourteenth Amendment. The test involved the following factors:

1. "The historical context and conditions" existing prior to the enactment,
2. "Immediate objective" of the action and
3. "Ultimate effect" of the action.

⁷ To speak of this law (closing the schools and providing tuition grants for students attending private schools) as operating equally is to equate equal protection with the equality Anatole France spoke of: The law "in its majestic equality, forbids rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."

Hull v. St. Helena Parish School Board, 197 F. Supp. 649, 655 (E.D. La — 1961) affirmed 368 U.S. 515 (1962).

In this case, the City of Jackson, historically, has encouraged and perpetuated segregation. The City's objective in closing the pools was to avoid the desegregation order. The effect was to deprive blacks of all swimming facilities.⁸

In *Anderson v. Martin*, 375 U.S. 399 (1964), the Court held that placing racial designations on voting ballots violated the Fourteenth Amendment. The State of Louisiana argued that these designations applied equally to both white and black candidates. The Court, in rejecting this argument, stated:

Obviously, Louisiana may not bar Negro citizens from offering themselves as candidates for public office, nor can it *encourage* its citizens to vote for a candidate solely on account of race.

* * * * *

Race is a factor upon which the statute operates and its involvement promotes the ultimate discrimination which is sufficient to make it invalid.

Anderson, supra, at 404 (Emphasis added).

⁸ The majority of the Fifth Circuit Judges sought to distinguish the case at bar from *Reitman* because California previously had an open housing law and the constitutional amendment there would involve the State in regressing from that law and encouraging private discrimination. Whereas, here there had been no previous attempt by the City to regulate private actions of racial discrimination. *Palmer v. Thompson* (Appendix A. p. 40). It makes no legal sense to condemn regression from a position improving race relations because it encouraged racial discrimination and approve the City of Jackson's continuation of a policy of racial separation which is the obvious result of closing the pools.

The majority also attempted to distinguish *Reitman* from this case by stating: "It is significant further that the subject facilities here, public in nature, have ceased to exist whereas the private facilities in *Reitman*, by their very identity and nature of necessity continue to exist." *Palmer v. Thompson* (Appendix A p. 40). But, these pools exist in their closed state as silent monuments to a system which holds blacks to be inferior and degraded.

In *Loving v. Commonwealth of Virginia*, 388 U.S. 1 (1966), the Virginia miscegenation statute was ruled unconstitutional. There again the "equal" application argument was urged by the State and rejected by the Court:

Because we reject the notion that mere 'equal application' of a statute containing racial classifications is enough to remove the classification from the Fourteenth Amendment's proscription of all invidious racial discrimination, we do not accept the State's contention that these statutes should be upheld if there is any possible basis for concluding they serve a rational purpose.

• • • • •

The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.

Loving, supra, p. 8 and 10. (Citing *Strauder, supra*, and *Ex Parte Virginia, supra*)

When the principles of *Anderson* and *Loving* are applied to this case, it becomes evident that the closing of the pools violates the Fourteenth Amendment. Despite the fact that the pools are "equally" unavailable to whites and blacks, it is undisputed that the closing of the pools was motivated by a lawsuit, a class action, brought by black citizens to obtain equally *open* facilities. To characterize the City's action as "equal" in any sense, is insulting. The closing was racially discriminatory in that it was a reaction to the demands of black citizens. The City would never acted as it did if the citizens who were making these demands had not been black.

In all of the aforementioned cases which reject the excuse of "equal application," the rationale has been that the action taken by the state or local government permitted

them to officially foster and encourage racism. The same rationale applies in this case. What the City of Jackson has accomplished by closing the pools is that it has taken this dramatic opportunity to tell its citizens that racial integration is so unsafe that public facilities should waste and wither in preference to racial integration; and, that integration is so evil that it will not in the future "reopen or operate these pools on an integrated basis."

Nor is the case of *Evans v. Abney, supra*, in point. In that case the court held merely that inherited land ~~shall~~ revert to next of kin when one testator has required that a public gift be officially segregated. In this case there was no testament or property interest which demanded segregation in the pools. Thus, there is no constitutional restriction on their being operated as integrated facilities. In fact, in *Evans, supra*, the court spoke of the kind of situation involved herein:

A second argument for petitioners stresses the similarities between this case and the case in which a city holds an absolute fee simple title to public park and then closes that part of its own accord solely to avoid the effect of a prior court order directing that the park be integrated as the Fourteenth Amendment commands. Yet, assuming *arguendo* that the closing of the park would in those circumstances violate the Equal Protection Clause, that case would be clearly distinguishable from the case at bar because there it is the State and not a private party which is injecting the racially discriminatory motivation.

Evans v. Abney, 90 S. Ct. 633.

It has never been a defense to wrongful acts that the undoing of them would be difficult or costly. The City of Jackson has historically created a system of racial dis-

crimination which has fostered a climate of hatred, prejudice and distrust. It should not be able to assert that the very climate it created justifies the City's denial of constitutional rights to blacks. *Cooper v. Aaron, supra*.

The implications of the City of Jackson's action were clearly stated by Judge Wisdom in his dissenting opinion:

We should not be misled by the equal-application argument. That argument smacks of the repudiated separate-but-equal doctrine of *Plessy v. Ferguson*. We should not be misled by focusing on the city's non-operation of the pools. Closing the pools as an official act to prevent Negroes from enjoying equal status with whites constituted the unlawful state action. It has the same purpose and many of the same effects as maintaining separate pools.

We should recognize the actual traumatic impact of the action on Negroes for what it was. It was a reaffirmation of the Dred Scott article of faith that Negroes are indeed "a subordinate or inferior class of beings, who had been subjugated by the dominant race" and are not members of the "people of the United States." This is the badge of servitude, the sign of second-class citizenship, the stigma that the Thirteenth, Fourteenth and Fifteenth Amendments were designed to eradicate. (Wisdom, Dissent—Appendix A, p. 64.)

3. WHEN THE OPINION BELOW APPROVED THE CLOSING OF THE POOLS WHEREBY THE PETITIONERS WERE DEPRIVED OF FACILITIES WHICH HAD PREVIOUSLY BEEN AVAILABLE ON A SEGREGATED BASIS, IT PERMITTED SANCTIONS TO BE IMPOSED UPON THE PETITIONERS BECAUSE THEY COMMENCED AN INTEGRATION LAWSUIT AND VIOLATED RIGHTS GUARANTEED UNDER 42 U.S.C. §1981.

The Civil Rights Act of 1866 guarantees to all citizens the right to use the legal system of this nation in the same way "as is enjoyed by white citizens." 42 U.S.C. §1981. In this case, the response of the defendant to the petitioners' search for justice in the court was to deny them any swimming facilities whatsoever. Thus, the defendant sought to punish the plaintiffs for going into court at all.

This is no different than what was condemned by this court in *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964). In that case, the court "emphasized the precise terms of §203(c) that prohibit any attempt to punish persons for exercising rights of equality conferred upon them by the Act." *State of Georgia v. Rachel*, 384 U.S. 780, 804 (1966). The "attempt to punish" condemned in *Hamm* (and, indirectly, in *Rachel*) was not the ultimate possibility of a conviction but rather the harassing tactic of the prosecution itself. Thus, the fact that the government employed sanctions against persons for the legitimate exercise of rights guaranteed under a federal statute is sufficient to invalidate those sanctions.

The same is true in this case. Sanctions were imposed upon these petitioners. They were deprived of all swimming facilities which they had previously enjoyed. The sanctions were imposed for the exercise of a legitimate right: The petitioners legitimately and rightly sought re-

dress in court from segregation and it was in response to the court's integration order that the sanction, described above, was imposed. Not only were the petitioners acting legitimately, their actions were specifically pursuant to a federal statute, 42 U.S.C. 1981, which specifically guarantees to these petitioners the same availability to the courthouse as is enjoyed by white people.

When the Congress of 1866 passed this Statute it extended to blacks the protective mantle of a federal statute which protected black people who sought the aid of the judicial system and the City of Jackson cannot be permitted to destroy this right.

The action of the City of Jackson in closing the swimming pools in response to a federal court order integrating them is also violative of Section 1981 in that it may effect further decisions of blacks to seek redress in courts. To seek redress in the courts for purposes of obtaining integration, plaintiffs must decide whether the risk created by a successful law suit—the city closing the facility—is worth the benefit of their right to sue.

In a situation where union members have been guaranteed the right to sue their union under Labor Management Reporting and Disclosure Act (L.M.R.D.A.), 29 U.S.C. §441(a) (4), federal courts have held that a union constitution was invalid when it forced the members to hazzard membership rights because they brought legal action. For example, in *Ryan v. International Brotherhood of Electrical Workers*, 361 F. 2d. 942 (7 C.C.A., 1966) cert. den. 385 U.S. 936 (1966), the defendant's constitution required that a member exhaust internal remedies prior to instituting legal action. Subsequent to a federal court decision holding that plaintiffs had not properly exhausted their remedies, the plaintiffs were expelled. The court found that the effect

of the union's constitution providing for exhaustion violated the "right to sue" provision of the L.M.R.D.A.:

This claim of the union . . . makes a member's bringing suit against a union or its officers too chancy a gamble for the member and effectually blocks access to the courts by placing the member in a dilemma of swallowing the grievance . . . or suing upon the speculation that he will be safe from expulsion by the court's discretion (that there was no need to exhaust) being exercised in his favor.

Ryan, supra, at 946; cf. *Retail Clerks Union v. Retail Clerks Int. Ass'n*, 299 F. Supp. 1012 (D. C., 1969)

If Congress in granting new rights to union members did not intend that they be exposed to loss of membership as a risk of bringing a law suit, then §1981, which created new rights for black people to seek justice in the courts, should likewise be held to bar a city from subjecting black plaintiffs to the risk of losing recreational facilities because they successfully sought the court's assistance in obtaining integration. The City's action in closing the pools places black people in a dilemma not unlike and no more permissible than the one encountered by the union members in *Ryan*. Blacks must either "swallow their grievance" or "speculate" as to whether, if they obtain judicial relief, the subject facility will be eliminated. This dilemma, if condoned, will effectively bar black citizens from access to the courts and deny them the right to sue guaranteed by Section 1981.

No rationalizing of motives, such as that engaged in by the majority below, can obscure the stamp of inferiority placed on black citizens by the action of the City of Jackson. Yet, sadly, that action merely teaches your petitioners

a lesson that they have been suffered to learn since they were brought to this country as slaves. This controversy raises the question whether black citizens will be taught an ever harsher lesson—that should they take their grievances to the federal judiciary for redress, their struggle for equality will be set back further than if they had not sought judicial remedy at all. Therefore, this Court is presented not only with the question whether petitioners' dream may be realized but also whether the federal courts will be an effective arena in which the process of that realization will be furthered.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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APPENDICES

3
KITHURVETTA

APPENDIX A

**UNITED STATES COURT OF APPEALS
For the Fifth Circuit**

October Term, 1966

No. 23841

D.C. Docket No. CA 3790

**HAZEL PALMER, ET AL.,
Appellants,**

versus

**ALLEN C. THOMPSON, Mayor,
City of Jackson, Et Al.,
Appellees.**

*Appeal from the United States District Court for the
Southern District of Mississippi*

Before Rives, Coleman and Godbold, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Dis-

trict Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Hazel Palmer, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

August 29, 1967

Issued as Mandate: Sept. 20, 1967

In The
UNITED STATES COURT OF APPEALS
For the Fifth Circuit

(Filed Oct. 25, 1967)

No. 23841

Hazel Palmer, et al,
Appellants,

versus

Allen C. Thompson, Mayor,
City of Jackson, et al,
Appellees.

ORDER GRANTING REHEARING, EN BANC

*Appeal from the United States District Court for the
Southern District of Mississippi*

Before: Brown, Chief Judge; Tuttle, Wisdom, Gewin,
Bell, Thornberry, Coleman, Goldberg, Ainsworth, Godbold,
Dyer and Simpson, Circuit Judges.

By the Court:

The Court on its own motion having determined to rehear this case en banc,

It is ordered that the cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

In The
UNITED STATES COURT OF APPEALS
For The Fifth Circuit

October Term, 1967

No. 23841

D.C. Docket No. CA 3790

Hazel Palmer, et al.,
Appellants,

versus

Allen C. Thompson, Mayor,
City of Jackson, et al,
Appellees.

*Appeal from the United States District Court for the
Southern District of Mississippi*

Before: Brown, Chief Judge; Rives, Tuttle, Wisdom,
Gewin, Bell, Thornberry, Coleman, Goldberg, Ainsworth,
Godbold, Dyer and Simpson, Circuit Judges.*

* Judge Clayton, now deceased, participated in the decision of this case and expressed his written concurrence in the opinion and decision on February 5, 1968, prior to his illness which disabled him from any further participation or action.

JUDGMENT ON REHEARING, EN BANC

This cause came on to be heard on rehearing en banc with oral argument;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the panel of this Court is affirmed.

Chief Judge Brown; Judges Tuttle, Wisdom, Thornberry, Goldberg, and Simpson, dissent reserving the right to file a dissenting opinion.

Judges Gewin, Coleman, Ainsworth, Goldberg and Dyer, concur.

Judge Bell concurs in the result and specially reserving the right to file a concurring opinion.

October 9, 1969

Issued as Mandate: Nov. 3, 1969

In The
UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 23841

Hazel Palmer, et al.,
Appellants,

versus

Allen C. Thompson, Mayor,
City of Jackson, et al.,
Appellees.

OPINIONS OF THE COURT OF APPEALS

*Appeal from the United States District Court for the
Southern District of Mississippi*

(October 9, 1969)

Before: Brown, Chief Judge; Rives, Tuttle, Wisdom,
Gewin, Bell, Thornberry, Coleman, Goldberg, Ainsworth,
Godbold, Dyer and Simpson, Circuit Judges.*

Rives, Circuit Judge: The briefs and arguments on re-hearing en banc have been confined to the first point discussed in the original opinion; that is, to whether the City of Jackson denied the equal protection of the laws to Negroes by the closing of all of its public swimming pools. The findings of fact by the district court on this point were set forth in the original opinion, and, for convenience, are again quoted:

* Judge Clayton, now deceased, participated in the decision of this case and expressed his written concurrence in the opinion and decision on February 5, 1968, prior to his last illness which disabled him from any further participation or action.

"The City of Jackson closed all swimming pools owned and operated by it in 1963, following the entry of a declaratory judgment by this Court in the case of *Clark v. Thompson*, 206 F. Supp. 539, affirmed 313 F.2d 637, cert. den. 376 U.S. 951, 84 S.Ct. 440, 11 L.Ed. 2d 312. No municipal swimming facilities have been opened to any citizen of either race since said time, and the City Council does not intend to reopen or operate any of these swimming facilities on an integrated basis. The personal safety of the citizens of the City and the maintenance of law and order would be endangered by the operation of public swimming pools on an integrated basis. These pools could not be economically operated in that manner. Although closed, the swimming facilities owned by the City are being properly maintained. In addition to closing the swimming facilities owned by it, the City cancelled its lease covering the Leavell Woods swimming pool in 1964."

On this rehearing we would observe the admonition of the Supreme Court that "generalizations do not decide concrete cases. 'Only by sifting facts and weighing circumstances' (*Burton v. Wilmington Parking Authority*, *supra* [365 U.S. 715], at 722) can we determine whether the reach of the Fourteenth Amendment extends to a particular case." *Evans v. Newton*, 1966, 382 U.S. 299, 300.¹ So doing, we search for further facts and circumstances.

First, it should be noted that the district court's findings were entered on the hearing of the plaintiffs' application for a temporary injunction. Thereafter the parties stipulated:

¹ To like effect, see *Reitman v. Mulkey*, 1967, 387 U.S. 369, 378.

" . . . that this action be and the same is hereby submitted to the Court for final decision on the merits on the complaint, answer, and affidavits heretofore filed and submitted by the parties, and on the full and complete hearing heretofore afforded the parties, at which all parties had an opportunity to offer any and all evidence desired, and on this Court's letter opinion filed herein dated September 14, 1965, and on this Court's separate findings of fact and conclusions of law filed herein by this Court in connection with this Court's order overruling plaintiffs' application for a temporary injunction.

"It is further stipulated and agreed that a final judgment may be entered herein on the foregoing without further hearing and without the offering of any further or additional evidence herein."

The district court then, upon the same findings of fact, entered final judgment that the plaintiffs are not entitled to relief. We note particularly that all parties agreed that they have "had an opportunity to offer any and all evidence desired."

In the case of *Clark v. Thompson*, cited by the district court, a declaratory judgment had been entered, "That each of the three plaintiffs has a right to unsegregated use of the public recreational facilities of the City of Jackson." After that decision had been affirmed per curiam by this Court and certiorari denied by the Supreme Court, the zoo, parks, and all recreational facilities except the pools were opened to the use of whites and blacks alike. The pools were closed. The only evidence as to the reasons and motives for such closing is contained in affidavits of the Mayor and of the Director of the Department of Parks and Recreation. We quote from the Mayor's affidavit:

"Realizing that the personal safety of all of the citizens of the City and the maintenance of law and order would prohibit the operation of swimming pools on an integrated basis, and realizing that the said pools could not be operated economically on an integrated basis, the City made the decision subsequent to the Clark case to close all pools owned and operated by the City to members of both races. The City thereby decided not to offer that type of recreational facility to any of its citizens, and it has not done so and does not intend to reopen any of said pools.

"All other recreational facilities have been completely desegregated and have been made available to all citizens of the City regardless of race."

The Director's affidavit was to the same effect and was supplemented by a second affidavit stating the average annual operating expense and revenue of the pools for the years 1960, 1961 and 1962, from which it appears that there was an average annual loss of \$11,700.00. The affidavit concluded: "that the City of Jackson would suffer a severe financial loss if it attempted to operate said pools, or any of them, on an integrated basis."

True, the City decided to close the pools rather than to operate them on an integrated basis. There was, however, no evidence that it reached that decision in an effort to impede further efforts to integrate. Nor did the court find any intent to chill or slow down the integration of other recreational facilities. To the contrary, as the Mayor's affidavit states, those were completely desegregated and made available to all citizens of the City regardless of race. The pools were closed because they could not be operated safely or economically on an integrated basis. Is that a denial of equal protection of the laws?

If so, then the plaintiffs must prevail, for "• • • law and order are not • • • to be preserved by depriving the Negro children of their constitutional rights."² Desirable as is economy in government and important as is the preservation of the public peace, "this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution."³ For that principle to be applicable, however, it must be held that the result of closing the pools because they cannot be operated safely or economically on an integrated basis deprives Negroes of the equal protection of the law. In our opinion that simply is not true.

The operation of swimming pools is not an *essential* public function in the same sense as the conduct of elections,⁴ the governing of a company town,⁵ the operation or provision for the operation of a public utility,⁶ or the operation and financing of public schools.⁷

Under the impetus of the declaratory judgment in *Clark v. Thompson, supra*, the City was making the transition in the operation of its recreational facilities from a segregated to an integrated basis. It had considerable dis-

² *Cooper v. Aaron*, 1958, 358 U.S. 1, 16.

³ *Buchanan v. Warley*, 1917, 245 U.S. 60, 81.

⁴ *Nixon v. Condon*, 1932, 286 U.S. 73; *Smith v. Allwright*, 1944, 321 U.S. 649; *Terry v. Adams*, 1953, 345 U.S. 461.

⁵ *Marsh v. Alabama*, 1946, 326 U.S. 501.

⁶ *Public Utilities Comm'n v. Pollak*, 1952, 343 U.S. 451; *Burton v. Wilmington Parking Authority*, 1961, 365 U.S. 715, 724; *Boman v. Birmingham Transit Co.*, 5 Cir. 1960, 280 F.2d 531; *Baldwin v. Morgan*, 5 Cir. 1961, 287 F.2d 750, 755.

⁷ *Brown v. Board of Education*, 1954, 347 U.S. 483, 493; *Guillory v. Tulane University*, E.D. La. 1962, 203 F.Supp. 855, 859, 863; *Hobson v. Hansen*, D.D.C. 1967, 269 F.Supp. 401.

cretion as to how that transition could best be accomplished. Local authorities have the duty of easing the transition from an unconstitutional mode of operation to one that is constitutionally permissible. That has been held true as to the reapportionment of the state legislative bodies⁸ and as to the desegregation of the public schools.⁹ The Constitution does, however, require that the end result be constitutionally permissible.

The equal protection clause is negative in form, but there is no denying that positive action is often required to provide "equal protection." That is frequently true as to essential public functions. Other functions permit more latitude of action. As to swimming pools, which a city may furnish or not at its discretion, it seems to us that a city meets the test of the equal protection clause when it decides not to offer that type of recreational facility to any of its citizens on the ground that to do so would result in an unsafe and uneconomical operation.

There is, of course, no constitutional right to have access to a public swimming pool. No one would question that proposition in circumstances having no racial overtones; as, for example, where all citizens of a municipality are of the same race, the closing of all municipal pools would embody no unconstitutional action or result.¹⁰

Attempts to analogize this case to *Reitman v. Mulkey*, 1967, 387 U.S. 369, and *Griffin v. School Board of Prince*

⁸ *Reynolds v. Sims*, 1964, 377 U.S. 533.

⁹ *Brown v. Board of Education*, 1954, 347 U.S. 483; *Shuttlesworth v. Birmingham Board of Education*, N.D. Ala. 1958, 162 F.Supp. 372, 379, 381, *aff'd*, 358 U.S. 101.

¹⁰ Arguments related to a due process or impairment of contract theory were foreclosed to plaintiffs by such cases as *Hunter v. Pittsburgh*, 1907, 207 U.S. 161, 177, 178. See in this regard, *Gomillion v. Lightfoot*, 1960, 364 U.S. 339, 342-43.

Edward County, 1964, 377 U.S. 218, offer little assistance. In *Reitman*, the Court held unconstitutional a recently adopted state constitutional amendment which declared that no agency of the state could interfere with the right of a property vendor or lessor to sell, rent or lease to anyone he chose. Considering the "purpose, scope, and operative effect" of the amendment, the Court stated that by, in effect, nullifying existing fair-housing laws, the state had adopted an affirmative policy of encouraging private discrimination. Significant state involvement in the private housing market, by prior regulation of fair-housing practices, supported the Court's conclusion. This case offers no circumstances involving the regulation of private activity, the abandonment of which can be transmuted into discriminatory state action. It is significant further that the subject facility here, public in nature, has ceased to exist, whereas the private facilities in *Reitman*, by their very identity and nature, of necessity continued to exist. The possibility that private pool owners in Jackson may operate segregated pools henceforth does not indicate any such state involvement in the past, present or future as could possibly require the application of the *Reitman* principles here.

In *Griffin*, the Court held as a violation of the equal protection clause the closing of all of the public schools of Prince Edward County, Virginia. The Court predicated its decision on two factors. Noting that none of the other counties in Virginia had closed their schools,¹¹ the Court

¹¹ On this point, Mr. Justice Black observed that "the Equal Protection Clause relates to equal protection of the laws 'between persons as such rather than between areas'," 377 U.S. at 230, but that Virginia law treated "the school children of Prince Edward County differently from the way it treats the school children of all other Virginia counties." *Id.*

pointed out that the state and county were supporting private, segregated schools with public funds, to the effect that, excluding one temporary expedient, "Prince Edward County school children, if they go to school in their own county, must go to racially segregated schools which, although designated as private, are beneficiaries of county and state support." 377 U.S. at 230-31. Pretermittting the question of swimming facilities available in other parts of Mississippi, on which there is no evidence, we see no involvement here of public funds applied to maintain any private swimming facilities.

The plaintiffs rely also on *Evans v. Newton*, 1966, 382 U.S. 296, but we do not think that case analogous. There the Court found that the public character of a purportedly private park required the park to be treated "as a public institution subject to the command of the Fourteenth Amendment," 382 U.S. at 302. "We only hold that where the tradition of municipal control had become firmly established, we cannot take judicial notice that the mere substitution of trustees instantly transferred this park from the public to the private sector." 382 U.S. at 301. In the case at bar, of course, there may well be inferred a "tradition of municipal control," but there the analogy must end. The city swimming pools in Jackson completely ceased to operate, whereas the park in *Evans v. Newton* continued to operate, with the benefit of continued "municipal maintenance and concern." 382 U.S. at 301.

Appellants have urged a theory other than those suggested explicitly by *Reitman*, *Griffin* and *Evans*. We understood them to argue in terms of a protected right to be a free and equal citizen. We understood counsel in oral argument, as well as by written brief, to state that the issue here is whether the Constitution forbids the City of Jackson from withdrawing a badge of equality. The

badge of equality, presumably, was the ability to swim in an integrated municipal swimming pool—the ability to enjoy, in an integrated fashion, recreational facilities operated by a municipality for its citizens. It cannot be disputed that were the badge of equality, here the ability to swim in an unsegregated pool, to be replaced by a badge implying inequality—segregated pools, the municipality's action could not be allowed. However, where the facilities around which revolve the status of equality are removed from the use and enjoyment of the entire community, we see no withdrawal of any badge of equality.

Plaintiffs extend their argument, however, urging that white people in general are more affluent and thus have greater access to private swimming facilities.¹² Therein, it is said, lies a fatal aspect of the alleged removal of the badge of equality—plaintiffs, and the class they represent, will continue to suffer unequal treatment as a result of municipal action. In this context, the argument carries little legal significance. The equal protection clause does not promise or guarantee economic or financial equality. In applying the requirements of the equal protection clause, this Court cannot require a city to operate a public swimming pool solely because the city's ceasing to do so forecloses the enjoyment by financially less fortunate citizens of recreational facilities available on a completely private basis to the more affluent.

Motive behind a municipal or a legislative action may be examined where the action potentially interferes with

¹² One pool formerly leased by the City has subsequently been operated by the local Y.M.C.A. on a white-only basis. There is no evidence however, of any public involvement in the operation of that pool. See, *e.g.*, *Evans v. Newton*, 1966, 382 U.S. 299, 302, citing *Terry v. Adams*, 1953, 345 U.S. 461; *Public Utilities Comm'n v. Pollak*, 1952, 343 U.S. 451; *Marsh v. Alabama*, 1946, 326 U.S. 501.

or embodies a denial of constitutionally protected rights. See, e.g., *Griffin v. School Board of Prince Edward County*, *supra*, and *Gomillion v. Lightfoot*, *supra*, n. 10. *Griffin*, *supra*, at 231, uses the expression that, "Whatever non-racial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional." That expression must not be lifted out of context. Read in connection with the attached footnote, the preceding part of the paragraph, and the paragraph which follows, it is clear that the Court was speaking of the kind of abandonment of public schools which would operate to continue racial segregation. We do not read this statement to prohibit the City from taking race into consideration if not for an invidious or discriminatory purpose. The consideration of racial factors has been endorsed in cases of national defense,¹³ the operation of the public schools,¹⁴ and the selection of jurors.¹⁵ In dismissing this complaint, after considering the affidavits and testimony, the district court found that the City officials acted in the interest of preventing violence and preserving economic soundness to the City's operations. Even though such motive obviously stemmed from racial considerations, we know of no prohibition to bar the City from taking such factors into account and being guided by conclusions resulting from their consideration.

Motivation has been pointed out here as a positive indication of municipal policy. It has been suggested that the

¹³ *Hirabayashi v. United States*, 1943, 320 U.S. 81, 100.

¹⁴ *Shuttlesworth v. Birmingham Board of Education*, *supra*, n. 9; see also *Darby v. Daniel*, S.D.Miss. 1958, 168 F.Supp. 170, 186.

¹⁵ *Brooks v. Beto*, 5 Cir. 1966, 366 F.2d 1, 25.

City has, in effect, adopted an official position that it would prefer to operate no pools rather than operate unsegregated pools. Without commenting on the soundness of the argument, we recognize that in the face of the substantial and legitimate objects which motivated the City's closing, to wit, the preservation of order and maintenance of economy in municipal activity, no such municipal policy can be inferred from the closing.

We agree with the district court that plaintiffs were not denied the equal protection of the laws by the closing of these swimming pools.

The judgment is Affirmed.

Chief Judge Brown, Judges Tuttle, Wisdom, Thornberry, Goldberg, and Simpson dissent reserving the right to file a dissenting opinion.

Judges Gewin, Coleman, Ainsworth, Godbold and Dyer, concur.

Judge Bell concurs in the result and specially reserving the right to file a concurring opinion.

In The
UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 23841

Hazel Palmer, et al.,
Appellants,
versus
Allen C. Thompson, Mayor,
City of Jackson, et al.,
Appellees.

CONCURRING OPINION

*Appeal from the United States District Court for the
Southern District of Mississippi*

(January 7, 1970)

Bell, Circuit Judge, specially concurring, with whom Judges Rives, Gewin, Coleman, Ainsworth, Godbold and Dyer join.

The footnote at the beginning of the majority opinion shows that Judge Clayton, now deceased, had concurred on February 5, 1968. Now almost two years later, the dissenting opinion has been filed. The pools in question here were closed in 1963. The suit which forms the subject matter of this appeal was filed in 1965. There was a prompt hearing in the district court and the judgment appealed from was rendered in 1965. The original panel decision affirming the denial of relief by the district court was

rendered on August 29, 1967. *Palmer v. Thompson*, 5 Cir., 1967, 391 F.2d 324. This is not to attribute the long delay to the parties; it is court produced. In any event, one must wonder what has happened to the pools in the long interim! Are they still in existence? If so, what condition are they in?

The final footnote¹ of the dissenting opinion shows that the differences between the majority and the dissenters are largely factual. The majority opinion had emphasized that "The only evidence as to the reasons and motives for such closing is contained in affidavits of the Mayor and of the Director of the Department of Parks and Recreation." [Majority typed opinion, p. 3]. The majority opinion also noted particularly that "all parties agreed that they had 'had an opportunity to offer any and all evidence desired.'" [p. 3] With deference, it would appear that the dissenting opinion, in making the finding that the City of Jackson acted in bad faith, simply departs from the record.² There is no record basis for such a finding.

Whether to operate swimming pools, racial discrimination aside, is a matter for the City of Jackson. We can easily surmise, indeed it may not be disputed, that the closings here were racially motivated. Mere racial motivation, however, is not proof of a racially discriminatory purpose in the closing. The presence or absence of such a

¹"We do not say that a city may never abandon a previously rendered municipal service. If the facts show that the city has acted in good faith for economic or other nonracial reasons, the action would have no overtones of racial degradation, and would therefore not offend the Constitution."

²Judge Rives wishes it noted that the City of Montgomery parks, contrary to footnote 14 of the majority opinion, are open and have been since 1965. This fact was called to the attention of the court by Judge Rives prior to the filing of the dissenting opinion.

purpose was and is the real issue. Courts, including federal courts, must travel on proof and there was a failure of proof in this case on the part of plaintiffs. We cannot assume racial discrimination simply from the fact of the closings. Constitutional principles, as important as they are, must nevertheless rest on facts. It may be that on a full hearing a factual base could be developed for the constitutional principles announced by the dissenting opinion. The case is here, however, on affidavits and the necessary factual basis is absent. I, therefore, concur.

In The
UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 23841

Hazel Palmer, et al.,
Appellants,
versus
Allen C. Thompson, Mayor,
City of Jackson, et al.,
Appellees.

DISSENTING OPINION

*Appeal from the United States District Court for the
Southern District of Mississippi*

(November 25, 1969)

Wisdom, dissenting, joined by Brown, Chief Judge, Tuttle, Thornberry, Goldberg and Simpson.

Wisdom, I respectfully dissent:

Long exposure to obvious and non-obvious racial discrimination has seasoned this Court. It is astonishing, therefore, to find that half of the member of this Court accept at face value the two excuses the City of Jackson offered for closing its swimming pools and wading pools. As found by the district court and blessed in the affirming opinion, these excuses are:

“[1] The personal safety of the citizens of the City and the maintenance of law and order would be

endangered by the operation of public swimming pools on an integrated basis.

[2] These pools could not be economically operated in that manner."

In *Griffin v. County School Board of Prince Edward County*, 1964, 377 U.S. 218, 84 S. Ct. 1226, 12 L.Ed. 2d 256, the School Board in Prince Edward County, Virginia, motivated by the intention of circumventing a desegregation order, as the City of Jackson was here motivated, closed the public schools in the county. The Supreme Court ordered the schools reopened. Moreover, the Court instructed the district court that it could require the County Supervisors to take the affirmative action of levying taxes to raise funds adequate to reopen and maintain the public school system. There are manifest factual differences between *Griffin* and the case before this Court: public schools in other Virginia counties stayed open; here, all municipal pools in Jackson were closed, although all other municipal recreational facilities were available on a desegregated basis. And there is a difference in the degree of essentiality between public school education and public recreational facilities—although no one today can deny that a city owes an obligation to its citizens to provide reasonably adequate recreational facilities.¹ But the rationale on which *Griffin* rests applies here:

Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional. 377 U.S. at 231.

¹ See *Evans v. Newton*, 1966, 382 U.S. 296, 86 S.Ct. 486, 15 L.Ed.2d 45.

I

A. Over fifty years ago, the Supreme Court demolished an excuse similar to the first excuse the City advances here. In *Buchanan v. Warley*, 1917, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149, the Court invalidated an ordinance of the City of Louisville prohibiting Negroes from occupying houses in blocks where the greater number of houses were occupied by whites, and vice versa. The City urged that the ordinance "will promote the public peace by preventing race conflicts". The Court dismissed this argument with a single sentence: "Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution." Over fifteen years ago, in the second *Brown*² decision, the Supreme Court declared: "[It] should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." 349 U.S. at 300. Over ten years ago, the Court dealt with a similar argument in the Little Rock school case, *Cooper v. Aaron*, 1958, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5. After quoting *Buchanan v. Warley*, the Court said: "Thus law and order are not here to be preserved by depriving the Negro children of their constitutional rights." In *Watson v. City of Memphis*, 1963, 373 U.S. 526, 83 S.Ct. 1314, 10 L.Ed. 2d 529, the City of Memphis sought to defend a gradual planned transition from segregated to integrated park facilities by asserting that it was necessary "to prevent interracial disturbances, violence, riots, and community confusion and turmoil," 373 U.S. at 535. For a unanimous Court, Mr. Justice Goldberg met this contention by asserting that the "compelling answer . . .

² 1955, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083.

is that constitutional rights may not be denied simply because of hostility to their assertion or exercise." Id.

In *Cooper v. Aaron* the district court found that there was "extreme public hostility" and that there were numerous acts of violence and disorder caused by opposition to desegregation of the schools in Little Rock. Here, there is no past history, only speculation rebutted by the existence of desegregated pools in southern cities.³ The City of Jackson's operation of other public recreational facilities on a desegregated basis indicates that the city's law enforcement officers are able to preserve peace and that the pools were closed not to promote peace but to prevent blacks and whites swimming in the same water.

B. The second reason the City asserts for closing the pools is that "these pools could not be economically operated" on an integrated basis. At about the same time the City closed its pools, it did away with public rest rooms in the Municipal Court Building and removed the benches and tables from the Livingston Park Zoo. We are told in Mayor Thompson's affidavit, "The public rest rooms are not maintained in the Municipal Court Building for the reason that the efficient operation of said building does not permit the furnishing of these facilities for the general public". Perhaps we are also supposed to believe that benches in Livingston Park were also removed for reasons of economy and efficiency.

A study of the record shows that Jackson, like all cities, does not expect its swimming pools, wading pools, and park benches to be maintained profitably as if each recreational facility were a business independent of the

³ As the Court knows, in some cities such as Tallahassee and New Orleans, pools that had been closed have now been reopened.

facilities and activities a municipal park offers its citizens.

The Department of Parks and Recreation operates all of the parks and playgrounds in the City of Jackson. The parks have such facilities as swimming pools, wading pools, "kiddie rides", baseball diamonds, tennis courts, and similar attractions. The Department also operates the Municipal Auditorium, College Park (Negro) Auditorium, Community Centers, Municipal golf courses (including a nine hole *Negro* golf course), Livingston Lake, city concessions, and the City Zoo. As is evident from the affidavit of George Kurts, Director of the Department, and from his itemized list of the numerous activities and facilities the Department maintains, few, if any, of the recreational activities could have been self-supporting.

For several years the pools for whites in Livingston, Battlefield Park, and College Park and the pool for Negroes in College Park had expenses of \$10,000 each against revenues of \$8000 each for the white pools and \$2500 for the Negro pool. In short, the pools had never been operated economically on a segregated basis; nor were the wading pools or park benches. The City charged swimming fees of only ten cents and twenty cents, described by the Director as the "lowest to be found in the country . . . in order to serve as many people as possible."

The swimming pools and wading pools, like benches in Livingston Park, are parts of a large recreation package. In Jackson the operating funds for the Department of Parks and Recreation come from a one mill levy and from revenue derived from certain operations such as auditorium receipts, pool and lake admissions, golf fees, concessions, kiddie rides, vending machines, and special events. And, as the Director said, "From the General Fund

is appropriated supplementary money needed to meet the overall operation of Parks and Recreation."

The district court found that the "City of Jackson closed all swimming pools owned and operated by it in 1963, following the entry of a declaratory judgment [of that] court in the case of *Clark v. Thompson*, 206 F. Supp. 539 requiring integration of the City's swimming and wading pools". This Court affirmed that decision, 313 F. 2d 637, and in April 1963 denied a rehearing. May 27, 1963, a committee, representing the Negro community in Jackson, met with Mayor Thompson and other city officials to present their grievances, including a request that the City desegregate its public facilities including parks and swimming pools. According to the uncontradicted affidavit of one of the Negroes present, Mayor Thompson declared that the public policy of the City of Jackson was to continue segregation of the races in the use and operation of city facilities. May 30, 1963, the Jackson Daily News reported Mayor Thompson as having announced, "Public swimming pools would not be opened on schedule this year due to some minor water difficulty". "Minor water difficulty" has disappeared as an excuse for the City's not having opened its pools in 1963 or since. The pools are still closed, except for the pool at Leavell Woods Park. They are being properly maintained, —without any off-setting revenues—or were in August 1965, according to Director Kurts.

The Leavell Woods Pool, unlike the other pools, had been leased by the City. Early in 1964 the City cancelled its lease on this pool. The Young Men's Christian Association promptly took over the leasehold and has since operated the pool exclusively for white patrons.

C. The excuse that integrated pools would pose a threat to law and order may have resulted from an honest

fear held by the Jackson City Fathers. But this fear does not justify yielding to the community hostility that produces it. Yielding puts a premium on violence, disorder, and further community resistance.

The excuse that the City of Jackson closed its swimming and wading pools because they could not be operated profitably is frivolous.

The City's action in closing its pools must stand or fall on a city's right to close a recreational facility on the "grounds of race and opposition to desegregation".

II.

A. My affirming brothers could not have been entirely satisfied with the reasons the City put forth for closing the swimming pools and wading ponds. They rely heavily, as did the district court, on the argument that the act operated equally on Negroes and whites. They say:

"It cannot be disputed that were the badge of equality, here the ability to swim in an unsegregated pool, to be replaced by a badge implying inequality—segregated pools, the municipality's action could not be allowed. However, where the facilities around which revolve the status of equality are removed from the use and enjoyment of the entire community, we see no withdrawal of any badge of equality."

This is a tired contention, one that has been overworked in civil rights cases. In *Griffin* the public school facilities of Prince Edward County were "removed from the use and enjoyment of the entire community". There too the public officials argued that tuition grants, as well as closing the schools, applied equally to Negroes and whites. Nevertheless the Supreme Court held that this retreat from the

operation of a public facility could not be justified on grounds of race and opposition to desegregation.

In *Loving v. Virginia*, 1967, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010, the State argued that its miscegenation statutes punish equally both the Negro and white participants in an interracial marriage. The Supreme Court "reject[ed] the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classification from the Fourteenth Amendment's proscription of all invidious racial discrimination". In *Anderson v. Martin*, 1963, 375 U.S. 399, 84 S.Ct. 454, 11 L.Ed.2d 430, the State defended a statute requiring that in all elections the nomination papers and ballots should designate the race of candidates. The State argued that the Act was "nondiscriminatory because the labeling provision applied equally to Negro and white". The Court held that in fact the State was attempting to encourage its citizens to vote for a candidate solely on the ground of race. "Race is the factor upon which the statute operates and its involvement promotes the ultimate discrimination which is sufficient to make it invalid." In *Virginia State Board of Education v. Hamm*, E.D.Va. 1964, 230 F. Supp. 156, *aff'd* 379 U.S. 19 (1964), the Virginia law under attack required that lists of voters and property tax assessments be kept separately for each race. The Negroes attacking the statutes demonstrated no measurable inequality or discriminatory effect. Nonetheless the Court summarily affirmed the district court's holding the law unconstitutional.

In cases such as *Loving v. Virginia*, *Anderson v. Martin*, and *Hamm*, the statute may have applied equally to Negroes and whites but that fact was irrelevant because race was the factor upon which the statute operated, just as race

was the factor that led the City of Jackson to close its pools.

Measurable inequality was not the basis for the Supreme Court's per curiam decisions that applied *Brown* to public parks⁴ and beaches,⁵ municipal theatres⁶ and golf courses,⁷ busses⁸ and courtrooms.⁹ In these cases the central vice in the unlawful state action was the forced display of a racial badge of inferiority. As the first Justice Harlan put it: "[Segregation statutes] in fact proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens . . ."¹⁰ Just as certainly as did the Jim Crow law considered in *Plessy v. Ferguson*, the swimming pool closing proceeds on the ground that Negroes are "so inferior and degraded that they cannot be allowed" to use public swimming pools with white people.

In this case, however, and in *Griffin* the equal application argument rests on the fallacious assumption that closing a public facility has the same effect on both Negroes and whites. Closing the schools in Prince Edward County had

⁴ *New Orleans City Park Development Ass'n v. Detiege*, 1958, 358 U.S. 54, 79 S.Ct. 99, 3 L.Ed.2d 46.

⁵ *Dawson v. Mayor and City Council of Baltimore City*, 1955, 350 U.S. 877, 76 S.Ct. 133, 100 L.Ed. 774.

⁶ *Muir v. Louisville Park Theatrical Ass'n*, 1954, 347 U.S. 971, 74 S.Ct. 783, 98 L.Ed. 1112; *Schiro v. Bynum*, 1964, 375 U.S. 395, 84 S.Ct. 452, 11 L.Ed.2d 412.

⁷ *Holmes v. City of Atlanta*, 1955, 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 776.

⁸ *Gayle v. Browder*, 1956, 352 U.S. 903, 77 S.Ct. 144, 1 L.Ed.2d 114.

⁹ *Johnson v. Virginia*, 1963, 373 U.S. 61, 83 S.Ct. 1053, 10 L.Ed.2d 195.

¹⁰ *Plessy v. Ferguson*, 1896, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256.

a conspicuously greater effect on Negro children than on white children. As Justice Black said:

"Closing Prince Edward's schools bears more heavily on Negro children in Prince Edward County since white children there have accredited private schools which they can attend, while colored children until very recently have had no available private schools, and even the school they now attend is a temporary expedient." (377 U.S. at 230).

Here too closing the pools in Jackson "bears more heavily on Negro children". Many white children in Jackson have the opportunity of swimming in country club pools or in pools owned by private persons or in pools operated at summer camps; all may swim in the Leavell Woods Pool. Few, if any, Negroes in Jackson have access to a swimming pool.

In *Hall v. St. Helena Parish School Board*, E.D.La. 1961, 197 F. Supp. 649, 655, *aff'd* 368 U.S. 515 (1962), the court said:

"to speak of this law [closing the schools and providing tuition grants for students attending private schools] as operating equally is to equate equal protection with the equality Anatole France spoke of: The law, 'in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.'"¹¹

B. The affirming opinion dismisses the subject of the Leavell Woods Community Park pool with the brief statement in a footnote that "There is no evidence, however,

¹¹ Anatole France, *Le Lys Rouge*, Ch. VII (1894).

of any public involvement in the operation of that pool". After the city cancelled its lease of the pool the Negroes in Jackson suffered the humiliation of seeing the Young Men's Christian Association operate the pool for whites only. This is exactly the kind of badge of inferiority my brothers refer to as impermissible. The City's withdrawal from performing a recreational function in favor of a private, segregated operation of the same facility is similar to the state's involvement in private discrimination condemned in *Burton v. Wilmington Parking Authority*, 1961, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45. In *Burton* the Supreme Court found that the State of Delaware had elected to place its power and prestige behind the admitted discrimination against Negroes by a private restaurant in a state-owned building.

III

We turn now to the decisions which support the plaintiff's position.

"[A]cts generally lawful may become unlawful when done to accomplish an illegal end and a constitutional power can not be used by way of condition to attain an unconstitutional result." *Western Union Telegraph Co. v. Foster*, 1918, 247 U.S. 105, 38 S.Ct. 438, 62 L.Ed. 1006. When, as in this case, a city closes a public facility for the purpose of avoiding a desegregation order and when the necessary effect of the city's retreat or withdrawal is to discriminate against Negroes the otherwise lawful closure becomes unlawful.¹²

¹² The city's argument fails to take account of the crucial distinction between the state's failure to institute a new service and its abandonment of a service if formerly provided. There are many things a

In *Evans v. Newton*, 1966 382 U.S. 296, 86 S.Ct. 486, 15 L.Ed.2d 275, the City of Macon, Georgia, was trustee for Bacon's Park, a park open only to white persons. The Court held that the City could not resign as trustee, abandoning the park as a public activity, to avoid integration. "A park . . . is more like a fire department or police department that traditionally serves the community." 382 U.S. at 302. *Evans* is not distinguishable from the instant case. Considering the parks as a whole or the public recreational activities as a package, the City of Jackson should no more be allowed to abandon one phase of public recreation to avoid desegregation than the City

(Continued from preceding page)

state chooses not to do. When a state simply does not create one new program, or another, there is no change in the status quo. There is not "action" which could have a discriminatory impact. But when a state discontinues an existing service, clearly there is "action", and the action may well be a vehicle for discrimination. Practical as well as theoretical considerations dictate a distinction between the failure to establish a service and the abandonment of an existing one. Most important is the impact on the individual citizens. When a service has never existed there is no action to bring the state's animus home to those against whom it is directed. There is nothing to focus a generalized discriminatory atmosphere into a stinging rebuke. The impact is naturally much sharper when the state expresses its animus by taking away a previously enjoyed privilege. Then the state's discrimination is concentrated in an identifiable act. The rebuke is felt.

From the viewpoint of the city, also, it is more practical for a court to forbid the abandonment of a service than to order its original establishment. In the former case, facilities already exist, policies have been formulated, and the city already has an operative system of administration. In the latter case, the entire program must be constructed. Finally, it is more consonant with the traditional function of courts to enjoin abandonment than order a city to create and adopt an entirely new program.

In *Gomillion v. Lightfoot*, for example, the Court based its decision, at least in part, on the ground that the Alabama gerrymander deprived the Negro plaintiffs of something they had previously enjoyed—their "pre-existing municipal vote". 364 U.S. at 341.

of Macon was allowed to turn over Bacon's Park to private trustees. As the Court noted, "Mass recreation through the use of private parks is plainly in the public domain."¹³ 382 U.S. at 302. Bacon's Park in Macon would have ceased to exist too, as far as the City was concerned and as far as Negroes could use it, but for the Court's decision refusing to allow the City to retreat from its responsibility.

The Girard College case is another example of the principle that a city cannot by retreating avoid desegregating a facility. In *Commonwealth of Pennsylvania v. Board of Directors of City Trusts of the City of Philadelphia*, 1957, 353 U.S. 230, 77 S.Ct. 806, 1 L.Ed.2d 792, the Supreme Court held that Girard College, regardless of the language of the trust limiting students to white students, should be desegregated. The Orphans' Court of Pennsylvania, removed the City of Philadelphia as trustee and installed private persons as trustees. The Court of Appeals held that the State could not withdraw; the appointment of private trustees to continue operation of the college was unconstitutional state action. *Commonwealth of Pennsylvania v. Brown*, 3 Cir. 1968, 392 F.2d 120.

Thus in both these cases, as in the instant case, the city government tried to escape desegregating a facility by terminating the city's connection with the facility. The only difference here is that the method used to accomplish the objective was closing the pools rather than withdrawing as trustee. But it is just as wrong to close public facilities for racial reasons as it is to operate them on a racial basis. In each case race is the dominant factor guiding the decision.

In *Reitman v. Mulkey*, 1967, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 230, the Supreme Court affirmed a California de-

¹³ Citing *Watson v. Memphis*, 373 U.S. 526.

cision holding unconstitutional an amendment to the California Constitution, approved by the voters, repealing existing open housing laws and forbidding the State's interfering in the future with the absolute right of any person to sell or lease his property to any person. The amendment was neutral on its face and could be said to operate equally on Negroes and whites. The Court held that the amendment was discriminatory; that "even where the State can be charged only with encouraging rather than commanding discrimination", there was prohibited state involvement.

To find state discrimination the Court used the "three factor test" which the California Supreme Court enunciated: (1) "The historical context and the conditions existing prior to its enactment", (2) its "immediate objective", that is, its "immediate design and intent", and (3) its "ultimate effect". Applying the first factor, this Court is so familiar with the historical context and the conditions existing in Mississippi at the time the Jackson pools were closed that it is necessary only to quote from a case we decided in May 1963: "We again take judicial notice that the State of Mississippi has a steel-hard, inflexible, undeviating, official policy of segregation." *United States v. City of Jackson*, 5 Cir. 1963, 318 F.2d 1. Second, the immediate objective in closing the public pools was to avoid complying with the desegregation order issued in *Clark v. Thompson*. Third, for white persons the first effect of closing the pools was to encourage private enterprise to supply segregated pools for white patrons. For Negroes the first effect was punitive: they were denied the opportunity of using even their segregated pool. The ultimate effect is to encourage segregation to the detriment of Negroes. All public recreational facilities are now in jeopardy.

In *Hunter v. Erickson*, 1969, 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616, the City of Akron, Ohio, amended its charter to prevent the city council enacting any ordinance dealing with racial, religious, or ancestral discrimination in housing without the approval of a majority of voters. The Court found that this was a denial of equal protection in that "Only laws to end housing discrimination based on 'race, color, religion, national origin or ancestry' must run § 137's gauntlet." There again the City argued that all groups were treated equally. The Court said, "Moreover, although the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority." Thus, as in *Reitman* the court regarded the actual impact on minority groups as controlling rather than the apparent neutrality of the law.

Federal courts are used to comparable situations in the field of labor law. Time and again this Court has had to determine whether an employee was discharged for good reason, for no reason, or on account of the employee's labor union activity. In *Textile Workers of America v. Dartington Manufacturing Company*, 1965, 380 U.S. 263, 85 S.Ct. 994, 13 L.Ed.2d 827, the defendants owned several plants, in one of which employees sought to organize for collective bargaining. The defendants closed the plant in question shortly after the employees voted in favor of unionization. The Supreme Court remanded the case to the NLRB for a factual determination of the purpose and effect of closing the plant. The company could go out of business entirely, but closing one plant was an unfair labor practice, if motivated by a purpose to chill unionism in any of the remaining plants. Here there can be no doubt of the chilling effect the closing of Jackson's pools had on the Negroes who presented their grievances to Mayor Thomp-

son and on all Negroes using the parks and other public facilities. Negroes in Jackson are now on notice that a petition to redress grievances may lead to a change for the worse.

Gomillion v. Lightfoot, 1960, 364 U.S. 339, 81 S.St. 125, 5 L.Ed.2d 110, involved another situation where the factual effect of racially motivated action was determinative of unconstitutionality. The Alabama legislature had redrawn the boundaries of the City of Tuskegee to exclude most of the Negro voters. The legislature has broad authority to fix and from time to time alter municipal borders. But state authority is not insulated from judicial control "when state power is used as an instrument for circumventing a federally protected right". 364 U.S. at 347. In many cases, said Justice Frankfurter, the Court has "prohibited a State from exploiting a power acknowledged to be absolute in an isolated context". The Court held that the Fifteenth Amendment negated the state's power to redraw boundaries that did away with the Negroes' pre-existing right to vote in municipal elections.

.

The closing of the City's pools has done more than deprive a few thousand Negroes of the pleasures of swimming. It has taught Jackson's Negroes a lesson: In Jackson the price of protest is high. Negroes there now know that they risk losing even segregated public facilities if they dare to protest segregation. Negroes will now think twice before protesting segregated public parks, segregated public libraries, or other segregated facilities. They must first decide whether they wish to risk living without the facility altogether, and at the same time engendering further animosity from a white community which has lost its public facilities also through the Negroes' attempts to desegregate these facilities.

The long-range effects are manifold and far-reaching. If the City's pools may be eliminated from the public domain, parks,¹⁴ athletic activities, and libraries also may be closed. No one can say how many other cities may also close their pools or other public facilities. The City's action tends to separate the races, encourage private discrimination, and raise substantial obstacles for Negroes asserting the rights of national citizenship created by the Wartime Amendments.

We should not be misled by the equal-application argument. That argument smacks of the repudiated separate-but-equal doctrine of *Plessy v. Ferguson*. We should not be misled by focusing on the city's non-operation of the pools. Closing the pools as an official act to prevent Negroes from enjoying equal status with whites constituted the unlawful state action. It had the same purpose and many of the same effects as maintaining separate pools.

We should recognize the actual traumatic impact of the action on Negroes for what it was. It was a reaffirmation of the *Dred Scott* article of faith that Negroes are indeed "a subordinate or inferior class of beings, who had been subjugated by the dominant race" and are not members of the "people of the United States".¹⁵ This is the badge of servitude, the sign of second-class citizenship, the stigma that the Thirteenth, Fourteenth, and Fifteenth Amendments were designed to eradicate.¹⁶

¹⁴ The City of Montgomery closed its parks January 1, 1959. They are still closed. A panel of this Court held that it was "a matter committed to the wisdom of the members of the Board of Commissioners and is not subject to review by the Court in the absence of some violation of the Constitution of the United States." *City of Montgomery v. Gilmore*, 5 Cir. 1960, 277 F.2d 364.

¹⁵ *Dred Scott v. Sanford*, 1857, 60 U.S. (19 How.) 393.

¹⁶ We do not say that a city may never abandon a previously rendered municipal service. If the facts show that the city has acted in good faith for economic or other nonracial reasons, the action would have no overtones of racial degradation, and would therefore not offend the Constitution.

In The
UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 23841

Hazel Palmer, et al.,
Appellants,
versus
Allen C. Thompson, Mayor, City of Jackson, et al.,
Appellees.

*Appeal from the United States District Court for the
Southern District of Mississippi*

(January 22, 1970)

ADDENDUM TO THE DISSENTING OPINION

Wisdom, Circuit Judge: I erred in saying that the public parks in Montgomery, which the City closed in 1959, are still closed. See footnote 2 of Judge Bell's opinion. As a matter of fact, since 1965 anyone may enjoy the trees, the flowers, the scenic beauty of the parks. But visitors to Montgomery's park will find no animals in the City Zoo and no water in the public swimming pools.

SUPREME COURT OF THE UNITED STATES

No., October Term, 19

Hazel Palmer, et al.,
Petitioners,

vs.

Allen C. Thompson, Mayor, City of Jackson, et al.

ORDER EXTENDING TIME TO FILE PETITION
FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for
petitioner(s),

It Is Ordered that the time for filing a petition for writ
of certiorari in the above-entitled cause be, and the same
is hereby, extended to and including March 8, 1970.

/s/ Warren E. Burger
Chief Justice of the United States

Dated this 23 day of December, 1969.

APPENDIX B

United States of America

UNITED STATES DISTRICT COURT
for the Southern District of Mississippi

Hazel Palmer, et al.,

vs.

Allen C. Thompson, Mayor, City of Jackson Mississippi,
et al.

(Civil Action No. 3790)

AFFIDAVIT OF CAROLYN STEVENS

County of Hinds,
State of Mississippi—ss.

Personally came and appeared before me, the undersigned authority, in and for the County and State of aforesaid Carolyn Stevens, who after being duly sworn by me states upon her oath that:

1. That she is one of the plaintiffs in the above entitled cause.
2. That she is 26 years old and a citizen of the United States and a member of the Negro race and has been a resident of the City of Jackson, County of Hinds, for her entire life.
3. That she is the mother of two minor children ages four and two, who reside with her in the City of Jackson, County of Hinds, Mississippi. Said children are healthy, active and in need of adequate recreational facilities in order to enjoy the benefits of a normal and healthy childhood.

4. That she is part owner of a certain parcel of real property located within the corporate limits of the City of Jackson upon which various real property taxes have been levied from time to time by public officials and used to defray the expenses of erecting and maintaining certain public facilities including parks in the City of Jackson, Mississippi.
5. That from December 1, 1945 and up until 1963 the City of Jackson, Mississippi by and through the Jackson Department of Parks and Recreation have owned, operated and maintained various public parks within the City of Jackson and at public expenses. These various parks include facilities for various public recreational activities including but without limitation golf, tennis, playgrounds and in particular swimming and wading facilities.
6. That these facilities and parks as of approximately 1960 included at least seven different park facilities and approximately 700 acres of park grounds within the corporate limits of the City of Jackson. Among the parks were the following: Livingston, Battlefield, Riverside, Leavell Woods, Community Park, College Park and the Air Base Recreational facility, all of which except the last named includes wading pool or swimming pool.
7. A full description of each recreational facility referred to in the proceeding paragraph appears in an official publication of the Jackson Department of Public Recreation of the City of Jackson. A copy of which is annexed hereto and marked affiant's Exhibit "A".
8. In 1962, the population of the City of Jackson was 150,000, 100,000 of whom were members of the white race and 50,000 of whom were members of the Negro race. Between the years 1954 and 1963 and continuing up until the present time it was the stated and strict policy of the

State of Mississippi and the City of Jackson and the respective officials and representatives to maintain and enforce segregation of the races with regard to creation, operation and use of public facilities including those public parks and swimming facilities hereinbefore referred to and described in Affiant's Exhibit "A".

9. As a part of the policy of racial segregation maintained and enforced by the City of Jackson with regard to swimming facilities, the Department of Parks and Recreation did prior to 1963 maintain separate parks and swimming pool, golf and auditorium facilities for Negroes which separate Negro facilities are identified and described by the City itself in Affiant's Exhibit "A".

10. During the year 1963, and particularly in May and June of that year, Negro citizens of Jackson organized together for the purpose of presenting certain grievances of the Jackson Negro Community to the public authorities generally and to defendant Thompson as Mayor of Jackson in particular. A committee representing the Negro community met with defendant Thompson and City Commissioners D. L. Luckey and Tom Marshall on May 27, 1963 to present said grievances to Mayor Thompson and other City Officials. These grievances included a specific demand that the City of Jackson desegregate public facilities including public parks and swimming facilities.

11. Thereafter, and on various occasions, defendant Thompson stated and declared that the public policy of the City of Jackson was to continue segregation of the races with regard to use and operation of City facilities. Affiant has made a study of the newspaper accounts of defendant Thompson's statements regarding segregation of public facilities during the critical months of May and June of 1963. Defendant Thompson's statements are cata-

logued in Affiant's Exhibit "B", and display on unequivocal intention on the part of the chief executive of the City of Jackson to prevent integration of the races at public facilities of the City of Jackson at whatever cost (See Affiant's Exhibit "B").

12. Thereafter and on or about May 30, 1963, defendant Thompson was reported as having announced, "Public swimming pools would not be opened on schedule this year due to some minor water difficulty." (*Jackson Daily News*, May 30, 1963, p. 1).

13. From May 30, 1963, until the present time swimming and wading pools at all public parks in the City of Jackson has been closed down and inoperative with the exception of the swimming pool at Leavell Woods Park. Since May 30, 1963, white and Negro citizens of the City of Jackson have been deprived of the right to use and enjoy public bathing facilities at all City parks except at the Leavell Woods Park.

14. Affiant states that upon information and belief the Leavell Woods swimming pool has been transferred, leased, or granted to private persons, in particular the Leavell Woods Community Foundation, a non-profit Mississippi Corporation, and/or the Young Men's Christian Association of Jackson, Mississippi . . . which organizations are presently operating said pool in such a way as to prevent Negro citizens including the plaintiffs herein from entering and enjoying the same. Affiant is informed and believes that defendants, acting under color of authority of the law of the State of Mississippi and City of Jackson have closed the swimming and park facilities of the City of Jackson for the sole purpose of preventing Negro citizens of the City of Jackson from enjoying the use and benefit of such facilities.

15. Affiant is further informed and believes that defendants have into contractual arrangements with the

Young Men's Christian Association of Jackson, Mississippi and/or the Leavell Woods Community Foundation of Jackson, Mississippi. These arrangements were intended to and do have the result of permitting private organizations to operate the swimming pool at Leavell Woods Park in a racially discriminatory manner thus excluding affiant, plaintiffs and other similarly situated from the use and enjoyment of the same. Defendants acts and conduct as alleged in the preceeding paragraphs injure affiant, plaintiffs and others similarly situated as follows:

1) Public pools at Battlefield Park, College Park, Riverside Park, and Livingston Park are being permitted to fall into a state of decline and decay through non-use and improper maintenance.

2) Affiant, plaintiffs and others similarly situated in Jackson, Mississippi, are being denied access to public swimming pools at Leavell Woods Park despite the fact that said pool is being used and enjoyed by white citizens of Jackson.

3) Negro citizens of Jackson and particularly Negro children are required to seek bathing, facilities in dangerous circumstances. As the result of this situation, two Negro children, Robert Kelly 14 and Melvin Houseworth, 11 were recently drowned while swimming in the Pearl River because public bathing facilities and appropriate supervision was not available to them.

And further Affiant saith not.

.....
Affiant

Sworn to and Subscribed before me a Notary

..... County, Mississippi
My Commission expires.....

AFFIANT'S EXHIBIT "B"

I. *Jackson Daily News*

May 24, 1962, p.1, (quoting Mayor Thompson):

"We will do all right this year at the swimming pools", the Mayor noted, "but if these agitators keep up their pressure, we would have five colored swimming pools because we are not going to have any intermingling." . . . He said the City now has legislative authority to sell the pools or close them down if they can't be sold.

II. *Jackson Daily News*

May 28, 1963 (quoting Mayor Thomson):

"In spite of the current agitation, the Commissioners and I shall continue to plan and seek money for additional parks for our Negro citizens. Tomorrow we are discussing with local Negro citizens plans to immediately begin a new clubhouse and library in the Grove Park area, and other park and recreational facilities for Negroes throughout the City. We cannot proceed, however, on the proposed \$100,000 expenditure for a Negro swimming pool in the Grove Park area as long as there is the threat of racial disturbances."

III. *Jackson Daily News*

May 24, 1963,, p. 1

"Governor Ross Barnett today commended Mayor Thompson for his pledge to maintain Jackson's present separation of the races."

IV. *Jackson Daily News*

May 25, 1963, p. 1

"Thompson said neither agitators nor President Kennedy will change the determination of Jackson to retain segregation."

In The
UNITED STATES DISTRICT COURT
for the Southern District of Mississippi
Jackson Division

Civil Action No. 3790

Hazel Palmer, et al.,
Plaintiffs,
vs.
Allen C. Thompson, et al.,
Defendants.

AFFIDAVIT OF GEORGE T. KURTS

United States of America
State of Mississippi
County of Hinds

Personally appeared before me, the undersigned authority in and for the jurisdiction aforesaid, George T. Kurts, who having been by me first duly sworn deposes and states on oath as follows, to-wit:

That he is Director of the Department of Parks & Recreation of the City of Jackson, and that he is Manager of the two city auditoriums and has occupied said positions since December 1, 1945.

Affiant denies that the public pool at either Battlefield Park or College Park or Riverside Park or Livingston Park is being permitted to fall into a state of decline and decay through nonuse or improper maintenance, and

would show unto the Court that each of said pools is being properly maintained.

Affiant would further show that for the years 1960, 1961, and 1962 the average operating expense of the pools in Battlefield Park, College Park, and Riverside Park was approximately \$10,000.00 each; that the average revenue from the operation of the pools at Battlefield Park and Riverside Park for said years was approximately \$8,000.00 each; that the average revenue from College Park for said years was approximately \$2300.00; that the City of Jackson would suffer a serious financial loss if it attempted to operate said pools, or any of them, on an integrated basis.

George T. Kurts

Sworn to and Subscribed before me, this ... day of August, 1965.

.....
Notary Public

My commission expires

CERTIFICATE

The undersigned counsel of record for the defendants in the above styled and numbered action hereby certifies that a true copy of the foregoing affidavit has been this day forwarded by United States Mail, postage prepaid, to Hon. Leonard W. Rosenthal, 313 E. Capitol, Jackson, Mississippi, Attorney of Record for the plaintiffs.

This ... day of August, 1965.

.....
Of Counsel for Defendants

In The
UNITED STATES DISTRICT COURT
for the Southern District of Mississippi
Jackson Division

Civil Action No. 3790

Hazel Palmer, et al.,
Plaintiffs,

vs.

Allen C. Thompson, Mayor, City of Jackson, et al.
Defendants.

AFFIDAVIT OF ALLEN C. THOMPSON

United States of America
State of Mississippi
County of Hinds

Personally appeared before me, the undersigned authority in and for the jurisdiction aforesaid, Allen C. Thompson, who having been by me first duly sworn deposes and states on oath as follows, to-wit:

That he is Mayor of the City of Jackson, which position he has held for more than sixteen years; that Jackson is a clean progressive city with approximately one-third of its citizens members of the Negro race; that Jackson had been noted for its low crime rate and lack of racial friction prior to 1961 when the self-styled freedom riders made their visits to this City. As the City rebuilt from the ashes of the Civil War, its white citizens occupied one area and its colored citizens chose to live to-

gether in another. As a result, there are large areas of the City occupied almost entirely by white people and other areas occupied exclusively by colored people. As this development took place, the City duplicated its parks, playgrounds, libraries and auditoriums in the white and colored areas. Prior to 1961 the members of each race customarily used the recreational facilities located near their homes. I believe that the welfare of both races would have best been served if this custom had continued. I fully realize that the City does not have the right to require or enforce separation of the races in any public facility. In 1961 at a time when racial tensions were inflamed by the visits of the freedom riders to Jackson, three Negroes filed suit to enjoin the City from denying them the right to use any and all recreational facilities owned and operated by the City. The Court declined to issue an injunction and granted a declaratory judgment to the effect that the plaintiffs were entitled to the free use of any and all recreational facilities provided by the City. *Clark, et al v. Thompson, et al* (decided May 15, 1962), 206 F. Supp. 539, affirmed 313 F.2d 637, cert. den. 11 LEd.2d 312.

Realizing that the personal safety of all of the citizens of the City and the maintenance of law and order would prohibit the operation of swimming pools on an integrated basis, and realizing that the said pools could not be operated economically on an integrated basis, the City made the decision subsequent to the Clark case to close all pools owned and operated by the City to members of both races. The City thereby decided not to offer that type of recreational facility to any of its citizens, and it has not done so and does not intend to reopen any of said pools.

All other recreational facilities have been completely desegregated and have been made available to all citizens of the City regardless of race. In 1961 the benches were

removed from the Livingston Park Zoo, but no other benches or tables have been removed from any other park, and all facilities of said parks and auditoriums have been and are available to all citizens of the City regardless of race.

Public rest rooms are maintained in City Hall, and same are available to all citizens regardless of race. Public rest rooms are not maintained in the Municipal Court Building for the reason that the efficient operation of said building does not permit the furnishing of these facilities for the general public.

Separate facilities and accommodations for white and Negro prisoners are maintained in the City jail. Such a separation in the jail is necessary for the maintenance of proper discipline and for the safety and protection of prisoners of both races. There is no discrimination between the races as to the quality of the facilities afforded.

Sworn to and subscribed before me, this day of August, 1965.

Notary Public

My commission expires:

CERTIFICATE

The undersigned counsel of record for the defendants in the above styled and numbered action hereby certifies that a true copy of the foregoing affidavit has been this day personally delivered to Hon. Leonard H. Rosenthal, Attorney of Record for the plaintiffs.

This day of August, 1965.

Of Counsel for Defendants

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1969

Hazel Palmer, et al.,
Petitioners,
vs.
Allen C. Thompson, Mayor,
City of Jackson, et al.,
Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of March, 1970, three copies of the Petition for Writ of Certiorari were mailed postage prepaid, to E. W. Stennett, City Attorney, Jackson, Mississippi, and to Thomas H. Watkins, Suite 800, Bankers Trust Plaza Building, Jackson, Mississippi, Counsel for the Respondent. I further certify that all parties required to be served have been served.

Alexandre J. Arene

FILE COPY

Office-Supreme Court,
FILED

APR 7 1970

JOHN F. DAVIS, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. ~~1989~~

107

HAZEL PALMER, ET AL, *Petitioners,*

vs.

ALLEN C. THOMPSON, MAYOR, CITY OF
JACKSON, ET AL, *Respondents.*

**BRIEF OF RESPONDENTS IN OPPOSITION TO WRIT
OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT.**

JOHN E. STONE
City Attorney
City Hall
Jackson, Mississippi

THOMAS H. WATKINS
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Jackson, Mississippi

ELIZABETH W. GRAYSON
Suite 800 - Bankers Trust Plaza Bldg.
Jackson, Mississippi

Attorneys for Respondents.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1969

No.

HAZEL PALMER, ET AL, *Petitioners,*

vs.

ALLEN C. THOMPSON, MAYOR, CITY OF
JACKSON, ET AL, *Respondents.*

**BRIEF OF RESPONDENTS IN OPPOSITION TO WRIT
OF CERTIORARI**

Summary of Argument

Petitioners seek a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, affirming an order of the United States District Court for the Southern District of Mississippi (Jackson Division) denying injunctive relief to the Petitioners who sought to require the City Officials to open its public swimming pools closed by the respondents after a federal court order integrating these facilities.

Respondents submit that Petitioners have not brought themselves within the considerations governing the review by this Court on Certiorari, controlled by Rule 19 of this Court. This rule provides: "A review on Writ of Certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." The character of the reasons which will be considered are thereafter listed in the rule. No listed reason is involved here.

There is here involved the right of a City to close all of its swimming pools to all citizens and not furnish such recreational facilities to any citizen. There is therefore no issue of discrimination on account of race, i.e., no 14th Amendment issue.

The Petition here is predicated on a review of the evidence by this Court and a reversal by this Court of the finding of fact of the court below, i.e., the fact that the closing of the pools to all citizens after an order requiring integration thereof was necessary because the personal safety of all citizens and the maintenance of law and order would be endangered by integrated operation thereof and because integrated pools could only be operated at a large financial loss. Petitioners' entire legal argument is based on this Court's reviewing this evidence and reversing of the findings of the court below. *This Court will not grant Certiorari to so do.*

The court below did not render a decision in conflict with the decision of any other Court of Appeals. Petitioners do not so contend. On the other hand, the decisions of all reported cases dealing with the same issue are in accord with the decision in the court below.

The court below did not render a decision in conflict with any applicable decision of this Court.

This cause involves no substantial issue of general importance. The issue here is limited in scope by the particular facts and circumstances. There is not here involved the broader question of whether a City can close a type of recreational facility after integration without any reason therefor except racial animosity. The right of a City to cease to perform a particular proprietary function would vary depending upon the particular function involved and the factual justification therefor. The burden on this Court of policing the factual justification for every such municipal action would be prohibitive.

Argument—Grounds for Denying Writ

1. *This Petition is an effort to have this Court by certiorari review the evidence.*

In 1963 the City of Jackson was operating segregated swimming pools. The District Court of the Southern District of Mississippi entered a declaratory judgment requiring the integration of swimming pools in the City of Jackson in the case of *Clark v. Thompson*, 206 F. Supp. 539, affirmed C.A. 5, 313 F. 2d 637, cert. den. 376 U.S. 951, 11 L.ed. 312.

Thereafter the City of Jackson ceased to operate any swimming pools and no municipal swimming facilities have been open to any citizen of either race since said time.

In August 1965 a petition was filed by Petitioners here seeking injunctive relief against the City and its officials to require the City to reopen the swimming pools. The United States District Court for the Southern District of Mississippi, Jackson Division, denied Petitioners the right to this injunctive relief. There was an appeal to the Fifth Circuit Court of Appeals. The Order of the District Court was affirmed by the Fifth Circuit Court of Appeals on August 29, 1967. Petitioners have failed to attach as an Appendix to their Petition a copy of this decision which is reported 391 F. 2d 324. The pertinent part thereof applicable to the issue here involved is attached hereto as Appendix "A". An order was entered for a rehearing en banc. On October 9, 1969 the prior judgment of the Court of Appeals was affirmed. The majority opinion of the Court of Appeals on the hearing en banc affirming the prior decision of that Court is made Appendix "B" hereto. A dissenting opinion was filed on November 25, 1969 (Petitioners' Appendix A, page 48). On January 7, 1970 a concurring opinion was filed (Petitioners' Appendix A, page 45). It specifically stated:

"The final footnote of the dissenting opinion shows that the differences between the majority and the dissenters are largely factual. The majority opinion had emphasized that 'The only evidence as to the reasons and motives for such closing is contained in affidavits of the Mayor and of the Director of the Department of Parks and Recreation.' [Majority typed opinion, p. 3]. The majority opinion also noted particularly that 'all parties agreed that they had "had an opportunity to offer any and all evidence desired"' [p. 3] With deference, it would appear that the dissenting opinion, in making the finding that the City of Jackson acted in bad faith, simply departs from the record. There is no record basis for such a finding." (Emphasis added.)

Here Petitioners seek a Writ of Certiorari in order that this Court may resolve the factual differences between the majority and the minority opinions in the Fifth Circuit Court of Appeals.

The evidence in the District Court and the findings of fact of the District Court and the findings of fact of the Court of Appeals disclose that while the closing of the swimming pools of the City of Jackson followed the decision in *Clark v. Thompson*, supra, that the motive of the City of Jackson was not a desire to discriminate against black people nor to harass and enslave black people and its decision was not made in bad faith but that the decision of the City Council was based on a motive of promoting the peace and general welfare of the Community and avoiding large economic losses from the operation of integrated pools. The lower courts found that there was no proof of any other motives of the City of Jackson in reaching its decision not to perform a purely discretionary proprietary function of operating this one particular recreational facility for members of any race.

The City of Jackson made a discretionary decision which it believed was for the best interest of the City and all citizens thereof. There was nothing before the courts below or before this Court to support a finding that the City was motivated in the decision finally arrived at by racial animosity or discriminatory intent or desire.

The case was tried by stipulation before the District Court on the pleadings and affidavits, but with full opportunity having been offered all parties for the introduction of any evidence desired, *and on the District Court's findings of fact and conclusions of law* (See opinion of the Court of Appeals on hearing en banc, Appendix "B" hereto).

The only evidence offered as to the motive or intent of the City was the affidavit of the Mayor (Petitioners' Appendix B, page 77), which contained the following language:

"Realizing that the personal safety of all of the citizens of the City and the maintenance of law and order would prohibit the operation of swimming pools on an integrated basis, and realizing that the said pools could not be operated economically on an integrated basis, the City made the decision subsequent to the Clark case to close all pools owned and operated by the City to members of both races. The City thereby decided not to offer that type of recreational facility to any of its citizens, and it has not done so and does not intend to reopen any of said pools."

There was no evidence to the contrary.

The motive or intent of the City was corroborated by the undisputed proof that although the Clark decision also involved other recreational facilities such as parks, the zoo, golf links, auditoriums, etc., that after the Clark decision no such facilities were closed but all were and are being operated on an integrated basis.

The operation of integrated swimming pools presented a unique problem as to the maintenance of law and order and as to the effect on the economy of the City. Not only would integrated pools be operated at a large loss, but it must be recalled that the operation of swimming pools is a proprietary, not a governmental function, and the City would be liable for damages to anyone using the same should under any circumstances it be held that the City did not provide adequate protection for the safety of the users and the maintenance of law and order¹. This could endanger the financial stability of the City.

The liability of a City arising out of the operation of such a proprietary function as a swimming pool is established. See the decisions in such cases as *Caporossi v. Atlantic City*, N.J., 220 F. Supp. 508, affirmed C.A. 3, 328 F. 2d 620, cert. den. 13 L.ed.2d 35, 379 U.S. 825, *City of Ferguson v. Marrow*, C.A. 8, 210 F.2d 520²; *Thomas v. Potomac Electric Power Co.*, D.C. D.C., 266 F.Supp. 687.

The finding of fact by the District Judge was as follows: (Appendix B)

"The City of Jackson closed all swimming pools owned and operated by it in 1963, following the entry of a declaratory judgment by this Court in the case of *Clark v. Thompson*, 206 F. Supp. 539, affirmed 313 F. 2d 312. No municipal swimming facilities have been opened to any citizen of either race since said time,

¹ In *Bullock v. Tamiami Trail Tours, Inc.*, C.A. 5, 266 F. 2d 326, damages were held recoverable for failure to protect passengers on a bus from assault reasonably foreseeable because of racial prejudice and racial tension in the community.

² Cf. *Hitchings v. Albemarle Hospital*, C.A. 4, 220 F. 2d 716 (hospital); *City of Orange, Tex. v. Lacoste, Inc.*, C.A. 5, 210 F. 2d 939 (a port); *Town v. Karpark Corp.*, C.A. 4, 194 F. 2d 616 (parking meters); *Dept. of Treasury v. City, Ind.*, 60 N.E. 2d 957 (golf course and airport); *Beard v. City & County of San Francisco*, 180 P. 2d 744 (hospital); *City of Tyler v. Ingram, Tex.*, 157 S.W. 2d 184 (park).

and the City Council does not intend to reopen or operate any of these swimming facilities on an integrated basis. *The personal safety of the citizens of the City and the maintenance of law and order would be endangered by the operation of public swimming pools on an integrated basis. These pools could not be economically operated in that manner.* Although closed, the swimming facilities owned by the City are being properly maintained. In addition to closing the swimming facilities owned by it, the City cancelled its lease covering the Leavell Woods swimming pool in 1964." (Emphasis added.)

The Circuit Court of Appeals for the Fifth Circuit on the rehearing en banc stated: (Appendix B)

"True, the City decided to close the pools rather than to operate them on an integrated basis. There was, however, no evidence that it reached that decision in an effort to impede further efforts to integrate. Nor did the court find any intent to chill or slow down the integration of other recreational facilities. To the contrary, as the Mayor's affidavit states, those were completely desegregated and made available to all citizens of the City regardless of race. The pools were closed because they could not be operated safely or economically on an integrated basis."

And yet here Petitioners seek to have this Court review the evidence, and this in spite of the fact that the findings were not only plainly supported by the evidence but there was no evidence to the contrary.

Petitioners' basic dependence upon a review of the evidence by this Court and finding of fact contrary to the findings of the courts below is evidenced throughout their

Petition. They are asking this Court to ignore the reasons established by the City for closing the pool and the motives therefor, and hold that as a fact the real motivation was "racism"; a deliberate "insult" to the Petitioners; a "marked dislike for black people"; an "insulting continuation of the badges of slavery".

Petitioners' entire legal argument is based upon this Court's review of and reversal of the findings of fact of the courts below, i.e., upon the assumption that it does so.

And yet in *General Talking Pictures v. Western Electric*, 304 U.S. 175, 83 L.ed 1273, this Court held:

"... Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it. *Southern Power Co. v. North Carolina Pub. Serv. Co.* 263 U.S. 508, 68 L.ed. 413, 44 S.Ct. 164; *United States v. Johnston*, 268 U.S. 220, 227, 69 L.ed. 925, 926, 45 S.Ct. 95; *Alabama Power Co. v. Ickes*, 302 U.S. 464, ante 374, 58 S.Ct. 300. There is evidence to support them." (82 L.ed. p. 1275)

In *Southern Power Co. v. North Carolina Public Service Co.*, 68 L.ed. 413, 268 U.S. 508, a Writ of Certiorari which had been granted was dismissed when it developed . . . "That the controverted question was whether the evidence sufficed to establish actual dedication of petitioner's property to public use, —primarily a question of fact."

2. *The Writ cannot be justified on the ground that the court below rendered a decision in conflict with the decision of another Court of Appeals on the same matter or in conflict with any applicable decision of this Court.*

While acts of City Officials motivated by a desire to protect the personal safety of citizens and maintain law and order or prevent economical injury to the City might not

always justify a deprivation of constitutional rights, *this is not the issue here*. On the other hand, there being no discrimination, Petitioners have no constitutional rights to the maintenance by a City of public swimming pools or the performance by a City of this proprietary function of furnishing this particular recreational facility. Having no such constitutional right, they are deprived of none.

No Court of Appeals of any other Circuit has held that any citizen has any constitutional right to the availability of public swimming pools, *where there is no discrimination*. Petitioners have cited none. In fact, every Circuit Court of Appeals and District Court where the exact issue has been presented has held that there is no such Constitutional right.

The holding in this case of the Fifth Circuit is in accord with its previous holding in *City of Montgomery v. Gilmore*, C.A. 5, 277 F. 2d 364, where the issue was the right of the City to close its parks. There that Court held:

"We agree with the district court that no law, State or Federal, requires the City to operate public parks.

...

"In its resolution closing the parks, the Board of Commissioners . . . stated that, 'the members of the Commission are of the opinion that it is to the best interests of the citizens of Montgomery that said parks be closed.' That is a matter committed to the wisdom of the members of the Board of Commissioners, and is not subject to review by this Court in the absence of some violation of the Construction of the United States."

Also, see the opinion of the Fifth Circuit in *Hampton v. City of Jacksonville*, 304 F. 2d 319.

In *Tonkins v. City of Greensboro*, D.C. N.C., 162 F.Supp. 549, 175 F.Supp. 478, affirmed C.A.4, 276 F. 2d 890, there was involved the issue as to whether or not the City had

the right to close the pools rather than operate them on an integrated basis. The Courts answered this question in the affirmative and held that no person had a constitutional right to swim in a public pool. The Court stated:

"With respect to the right of the plaintiffs, and other Negroes similarly situated, to use the Lindley Park Swimming Pool on the same terms and conditions applicable to white citizens, this would appear to be a moot question. The City of Greensboro, through its City Council, is firmly committed to a permanent closing and sale of the pool. . . .

"The question here presented is whether the defendants have the right to close or sell the Lindley Park Swimming Pool rather than to operate it on an integrated basis. The plaintiffs contend that the answer to this question depends upon whether there is a duty imposed upon the defendants to support the Fourteenth Amendment to the Constitution of the United States. There is no question but that the defendants do have a positive duty to support the Fourteenth Amendment and other provisions of the Constitution of the United States, as these provisions are interpreted by our Courts, *but the question still remains as to whether or not the Constitution of the United States imposes upon a municipality the positive duty to own and operate recreational facilities.*

. . .

"In the final analysis, the plaintiffs can only complain of discrimination or unequal treatment. If the swimming pools are closed to all, or disposed of through a bona fide public sale, there can be no unequal treatment and, therefore, no racial discrimination. No citizen of Greensboro will have access to municipal swimming facilities.

"Unless persons under the same circumstances and conditions are treated differently there can be no discrimination. *No person has any constitutional right to swim in a public pool.* All citizens do have the right, however, if a swimming pool is provided, not to be barred therefrom solely because of race or color. If the swimming pools are closed or sold, the rights of all groups will be equal, and it must follow that the closing or sale will not discriminate against anyone.

• • •

"In *Clark v. Flory*, D.C.E.D.S.C. 1956, 141 F.Supp. 248, 250 affirmed, 4 Cir., 1956, 237 F. 2d 597, where action was brought to restrain enforcement of segregation statutes in use of state park, the Court stated:

"'No one contends that this Court has the power to require the State of South Carolina to operate any park. This Court cannot by mandamus order the reopening of the closed park.'

"In *Simkins v. City of Greensboro*, D.C.M.D.N.C. 1957, 149 F.Supp. 562, it was held that a municipality was not required to furnish a golf course for its citizens but if it undertakes to do so out of public treasury, it cannot constitutionally furnish such facilities to a part of its citizens and deny them to others similarly situated."³

In *Wood v. Vaughan*, D.C. Va., 209 F.Supp. 106, affirmed C.A. 4, 321 F. 2d 474, the Court made the following comment:

"... Obviously the city officials realized that they could not legally maintain segregation in the pools and chose the course of abandoning the use of these facilities."

³ Quotation is from 162 F. Supp. 549.

ties rather than to desegregate them—a course that, where swimming pools are concerned, has been followed by many, if not all, of the southern cities in which the question has arisen. . . .”

The same result was reached in *Walker v. Shaw*, D.C. S.C., 209 F.Supp. 569, dealing with the right of the City of Greenville, South Carolina, to close its public skating rinks.

In *Lagarde v. Recreation & Park Commission*, D.C. La., 229 F.Supp. 379, the Court held:

“There is no legal obligation or duty on the part of the City or Parish to provide or operate any public recreational facilities. . . .”

In *Willie v. Harris County*, Tex., 202 F.Supp. 549, the Court pointed out that there was no constitutional compulsion which directed a state or its subdivisions to furnish recreational facilities.

With all swimming pools in the City of Jackson now closed and closed since 1963 there is no question of any discrimination on account of race and therefore no question arises under the Fourteenth Amendment to the Constitution.

Nor is the decision of the Fifth Circuit Court of Appeals in this case in conflict with any applicable decision of this Court.

Petitioners rely on *Griffin v. The County School Board of Prince Edward County, Virginia*, 377 U.S. 218, 12 L.ed.2d 256, involving the closing of the public schools in Prince Edward County, Virginia.

The relationship of a government to the operation of the public schools is not comparable to the furnishing of a recreational facility such as a swimming pool. The furnishing

of such recreational facilities is the exercise of the discretionary proprietary power of a local government, while the operation of public schools is the exercise of a governmental power, usually required by the state laws or by constitutional provisions.

In *Griffin* the Court merely held that there was discrimination against the petitioners and a denial of the equal protection of the law under the Fourteenth Amendment for two reasons:

(1) The state was discriminating against Petitioners in that it was by public statewide taxation supporting the public schools in every other county of the state except in Prince Edward County.

(2) Both the county and state were discriminating against petitioners, in that they both contributed to the support of private schools in Prince Edward County, but not to any public schools therein.

That this was the basis for the holding of a denial of constitutional rights clearly appears from the following language in the opinion:

"For reasons to be stated, we agree with the District Court that, under the circumstances here, closing the Prince Edward County schools while public schools in all the other counties of Virginia were being maintained denied the petitioners and the class of Negro students, they represent the equal protection of the laws guaranteed by the Fourteenth Amendment.

• • •

"... The new complaint charged that Prince Edward County was still using its funds, along with state funds, to assist private schools while at the same time closing down the county's public schools.

• • •

"... Accordingly, we agree with the District Court that closing the Prince Edward schools *and meanwhile contributing to the support of the private segregated white schools that took their place* denied petitioners the equal protection of the laws."

The Court in *Griffin* thus held that the children of all races had a right to public schools, if any children were being furnished such privileges. This is a far cry from a holding that any citizens of Jackson have a constitutional right to recreational facilities, such as a public swimming pool, when none of the citizens thereof are being furnished such facilities.

All other cases from this Court relied on by Petitioners involved actual discrimination on account of race or involved acts which promoted or statutes which authorized discrimination,⁴ not involved here.

In fact the decision of the court below is in line with phraseology of *Evans v. Abney*, 24 L.ed.2d 634, 396 U.S. 613. There a city was allowed to relinquish and give up a part claiming that if integrated the title, under the terms of a will, would revert to the heirs. A court decision to that effect was affirmed, i.e., there was a factual basis for abandoning the park. Here Respondents claim the right to cease the operation of public swimming pools after the City Council determined that the operation of the same endangered public safety and law and order and would ad-

⁴ For example, in *Jones v. Mayor*, 392 U.S. 409, 20 L.ed.2d 1189, the real issue was whether or not private discrimination on account of race was prohibited by 42 U.S.C. § 1982, as well as public discrimination. The discrimination involved was the lack of freedom of Negroes "to buy *whatever a white man could buy*". In *Anderson v. Martin*, 375 U.S. 399, 11 L.ed.2d 430, there was involved a statute providing that election documents designate the race of the candidate. While on its face it applied to all races it was held unconstitutional on the ground that equality was only superficial and that it actually *promoted* discrimination which made it invalid.

versely affect the economy of the City. The Court in *Evans* stated:

"Here the effect of the Georgia decision eliminated all discrimination against Negroes in the park by eliminating the park itself, and the termination of the park was a loss shared equally by the white and Negro citizens of Macon since both races would have enjoyed a constitutional right of equal access to the park facilities had it continued."

Here, as there, the effect of the decision of the City Council eliminated all discrimination against Negroes.

3. *There is not involved here any important question of Federal law which should be settled by this Court.*

Here there is not involved the broader question as to whether or not a City can close all its recreational facilities when they are integrated. Here the City of Jackson maintains and furnishes adequate recreational facilities on an integrated basis, i.e., golf links, zoo, parks, coliseum, etc. The swimming pools, used for only a few months of the year, were a minor luxury.

There is not presented here the broader question of whether a city can close a recreational facility without any factual justification therefor or merely because of racial animosity. The issue here involved is factually limited. The holding of the Court below only involves the closing of a recreational facility where there is a valid factual justification therefor, i.e., to preserve the safety and welfare of the public and the financial stability of the City.

The right of a city to cease to perform a particular proprietary function would vary depending upon the par-

ticular function involved and the factual justification therefor. The burden on this Court of policing the factual justification for every such municipal action would be prohibitive.

It will be noted that in all of the above cited cases where the same question has arisen in courts of appeal that in no instance was the question considered of sufficient importance to justify a Petition for Certiorari. It will also be observed that in District Court cases above cited the question was not considered of sufficient importance to justify an appeal to a Court of Appeals.

As pointed out, any question of discrimination has been removed by the Clark decision and that issue is now moot.

The policy of this Court with reference to granting Writs of Certiorari is stated in *S. S. Monroe v. Carbon Black Export*, 359 U.S. 180, 3 L.ed.2d 723, as follows:

"While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution here of the extent to which these bill of lading provisions may be given effect by our courts can await a day when the issue is posed less abstractly." (P. 726)

In *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 67 L.ed. 712, the Court in dismissing a Writ of Certiorari improvidently granted, commented on the burdened docket of this Court and then stated:

". . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embar-

rassing conflict of opinion and authority between the circuit courts of appeal."

In *Lee Moor v. Railroad*, 297 U.S. 101, 80 L.ed. 509, this Court commented on the hesitancy with which it would grant a Writ of Certiorari in a case involving a mandatory injunction which is granted or refused in the exercise of sound judicial discretion of the lower courts.

Conclusion

For the above reasons we respectfully submit that a Writ of Certiorari should not issue to review the judgment and opinion of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT.

No. 23841

HAZEL PALMER et al., *Appellants*,*v.*ALLEN C. THOMPSON, Mayor, City of Jackson et al.,
Appellees.

Aug. 29, 1967.

Class action by Negro citizens and residents of city to enjoin certain city officials from certain allegedly discriminatory conduct. The United States District Court of Mississippi, William Harold Cox, Chief Judge, rendered judgment denying relief and appeal was taken. The Court of Appeals, Rives, Circuit Judge, held that city may abandon operation of segregated public swimming pools to prevent them from being desegregated without violating equal protection clause of federal Constitution when swimming pools cannot be operated economically or safely as integrated pools.

Affirmed.

(WEST KEY NUMBER SYSTEM)

1. Constitutional Law (Key) 217

City may abandon operation of segregated public swimming pools to prevent them from being desegregated without violating equal protection clause of federal Constitution when swimming pools cannot be operated economically or safely as integrated pools.

2. Injunction (Key) 118(2)

Standing to enjoin discrimination in operation of non-recreational facilities must be apparent from the complaint.

3. Constitutional Law (Key) 42

Normally person cannot challenge constitutionality of statute unless he shows that he himself is injured by its operation.

4. Constitutional Law (Key) 42

Party challenging alleged segregation in operation of non-recreational public facility lacks standing to challenge alleged discrimination unless he has been aggrieved and either he or class of which he is a member may be aggrieved by the use of the segregated facility. U.S.C.A. Const. Amend. 14.

5. Constitutional Law (Key) 42

Person challenging constitutionality of segregated jail facility lacks standing to bring suit unless he is presently incarcerated or is threatened by government officials with incarceration. U.S.C.A. Const. Amend. 14.

6. Constitutional Law (Key) 42

All Negroes are not members of the class consisting of those Negroes threatened with or subjected to imprisonment in segregated jail facilities and only those Negroes presently incarcerated or threatened by government officials with incarceration have standing to challenge constitutionality of statute providing for segregation of prisoners. U.S.C.A. Const. Amend. 14.

7. Action (Key) 13

Only in exceptional circumstances where it would be difficult if not impossible for persons whose rights are being denied to present their grievances to the courts may a third party raise another's rights.

8. Federal Civil Procedure (Key) 656

Pleadings may be liberally construed.

L. H. Rosenthal, Jackson, Miss., Paul A. Rosen, Detroit, Mich., for appellants.

Thomas H. Watkins, E. W. Stennett, Jackson, Miss., for appellees.

Before RIVES, COLEMAN and GODBOLD, Circuit Judges.

RIVES, Circuit Judge.

Twelve Negro citizens and residents of Jackson, Mississippi, on their own behalf and "on behalf of the thousands of their fellow Negro citizens and residents * * * who are similarly situated because of race and color," filed a complaint against the Mayor and Commissioners of Jackson, its Police Chief, and its Director of Recreation, seeking to enjoin their allegedly discriminatory conduct. After joinder of issue and the filing of affidavits and stipulations showing the facts, the case was submitted to the district court for final decree on its merits. The court found that the plaintiffs were not entitled to any of the relief prayed and dismissed the complaint. On appeal, the plaintiffs seek review on two points stated in their brief as follows:

"First Point

"Where a local government closes its previously segregated public facilities to avoid a judgment declaring that Negroes have a right to use the facilities on an integrated basis, the closing violates the equal protection clause of the Constitution of the United States and Negro residents have a cause of action against the local government to compel re-opening of the facilities. The trial court erred in denying appellants' request for injunctive relief from appellees' discriminatory closing of the pools.

"Second Point

"Segregation of the races in municipal jails is forbidden by the Fourteenth Amendment. Where segregation of public facilities is pursuant to a state statute, such statute, is unconstitutional as contrary to the Fourteenth Amendment, and the trial court erred in denying appellants' request to enjoin operation of such facilities in a segregated manner."

There seems to be no dispute as to the facts; certainly the findings of fact are not clearly erroneous. Rule 52(a), Fed.R.Civil P. As to the swimming pools, the district court found the facts as follows:

"The City of Jackson closed all swimming pools owned and operated by it in 1963, following the entry of a declaratory judgment by this Court in the case of *Clark v. Thompson*, 206 F. Supp. 539, affirmed 313 F. 2d 637, cert. den. 376 [375] U.S. 951, 84 S. Ct. 440, 11 L.Ed.2d 312. No municipal swimming facilities have been opened to any citizen of either race since said time, and the City Council does not intend to reopen or operate any of these public swimming facilities on an integrated basis. The personal safety of the citizens of the City and the maintenance of law and order would be endangered by the operation of public swimming pools on an integrated basis. These pools could not be economically operated in that manner. Although closed, the swimming facilities owned by the City are being properly maintained. In addition to closing the swimming facilities owned by it, the City cancelled its lease covering the Leavell Woods swimming pool in 1964."

The district court's conclusions of law relating to the operation of the swimming pools were:

"The plaintiffs have no constitutional right to require the City of Jackson to maintain or operate specific facilities such as swimming pools, benches in parks, or public rest rooms in any particular building. Any public facility furnished by the City would have to be available to all citizens regardless of race. As to whether any particular facility will be furnished, the City officials exercise judgment on a matter committed to their wisdom which is not subject to review by any Court in the absence of violation of constitutional rights. *City of Montgomery v. Gilmore*, U.S.C.A. 5th, 277 F.2d 564 [364]; *Lagrade v. Recreation & Park Commission*, D.C. La., 229 F. Supp. 379. No person has a constitu-

tional right to swim in a public pool. *Tonkins v. City of Greensboro*, D.C. N.C., 162 F. Supp. 549. Where a public facility is closed to members of all races, any issue as to discrimination becomes moot. *Clark v. Flory*, U.S.C.A. 4th, 237 F.2d 597; *Wood v. Vaughan*, D.C.Va., 209 F. Supp. 106; *Walker v. Shaw*, D.C.S.C., 209 F. Supp. 569."

[1] The appellants urge that the City may not abandon the operation of public swimming pools to prevent them from being desegregated, and that to do so is contrary to the teaching of *Mulkey v. Reitman*, 1966, 64 Cal.2d 529, 413 P.2d 825, aff'd, May 29, 1967, U.S. No. 483, Oct. Term 1966, and of *Griffin v. County School Board of Prince Edward County*, 1964, 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256. In our opinion, the holding in neither of these two cases extends so far as to prevent the City from closing its swimming pools when they cannot be operated economically or safely as integrated pools.

The basic holding in *Mulkey v. Reitman*, according to our understanding, was that the State had become significantly involved in private discriminations against Negroes concerning residential housing. In *Griffin* the Supreme Court held that,

"For reasons to be stated, we agree with the District Court that, under the circumstances here, closing the Prince Edward County schools while public schools in all the other counties of Virginia were being maintained denied the petitioners and the class of Negro students they represent the equal protection of the laws guaranteed by the Fourteenth Amendment." 377 U.S. at 225, 84 S.Ct. at 1230.

The Court further held that, "Accordingly, we agree with the District Court that closing the Prince Edward schools and meanwhile contributing to the support of the private segregated white schools that took their place denied petitioners the equal protection of the laws." 377 U.S. at 232, 84 S.Ct. at 1234. Neither those cases nor any other authority

can permit a federal court to require a city to operate public swimming pools when to do so would endanger the personal safety of the city's citizens and the maintenance of law and order.¹

• • • • •

¹ We further agree with the finding of the district court that no racial discrimination was involved in the City's cancellation of its lease covering the Leavell Woods swimming pool.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 23841

HAZEL PALMER, et al., *Appellants*,*versus*ALLEN C. THOMPSON, Mayor, City of Jackson, et al.,
Appellees.

OPINIONS OF THE COURT OF APPEALS

*Appeal from the United States District Court for the
Southern District of Mississippi*

(October 9, 1969)

Before: Brown, Chief Judge; Rives, Tuttle, Wisdom, Gewin, Bell, Thornberry, Coleman, Goldberg, Ainsworth, Godbold, Dyer and Simpson, Circuit Judges.*

Rives, Circuit Judge: The briefs and arguments on rehearing en banc have been confined to the first point discussed in the original opinion; that is, to whether the City of Jackson denied the equal protection of the laws to Negroes by the closing of all of its public swimming pools. The findings of fact by the district court on this point were set forth in the original opinion, and, for convenience, are again quoted:

"The City of Jackson closed all swimming pools owned and operated by it in 1963, following the entry of a declaratory judgment by this Court in the case of *Clark v. Thompson*, 206 F. Supp. 539, affirmed 313 F. 2d 637, cert. den. 376 U.S. 951, 84 S.Ct. 440, 11 L.Ed. 2d 312. No municipal swimming facilities have been opened to any citizen of either race since said time,

* Judge Clayton, now deceased, participated in the decision of this case and expressed his written concurrence in the opinion and decision on February 5, 1968, prior to his last illness which disabled him from any further participation or action.

and the City Council does not intend to reopen or operate any of these swimming facilities on an integrated basis. The personal safety of the citizens of the City and the maintenance of law and order would be endangered by the operation of public swimming pools on an integrated basis. These pools could not be economically operated in that manner. Although closed, the swimming facilities owned by the City are being properly maintained. In addition to closing the swimming facilities owned by it, the City cancelled its lease covering the Leavell Woods swimming pool in 1964."

On this rehearing we would observe the admonition of the Supreme Court that "generalizations do not decide concrete cases. 'Only by sifting facts and weighing circumstances' (*Burton v. Wilmington Parking Authority*, *supra* [365 U.S. 715], at 722) can we determine whether the reach of the Fourteenth Amendment extends to a particular case." *Evans v. Newton*, 1966, 382 U.S. 299, 300.¹ So doing, we search for further facts and circumstances.

First, it should be noted that the district court's findings were entered on the hearing of the plaintiffs' application for a temporary injunction. Thereafter the parties stipulated:

"* * * that this action be and the same is hereby submitted to the Court for final decision on the merits on the complaint, answer, and affidavits heretofore filed and submitted by the parties, and on the full and complete hearing heretofore afforded the parties, at which all parties had an opportunity to offer any and all evidence desired, and on this Court's letter opinion filed herein dated September 14, 1965, and on this Court's separate findings of fact and conclusions of law filed herein by this Court in connection with this Court's order overruling plaintiffs' application for a temporary injunction.

¹ To like effect, see *Reitman v. Mulkey*, 1967, 387 U.S. 369, 378.

"It is further stipulated and agreed that a final judgment may be entered herein on the foregoing without further hearing and without the offering of any further or additional evidence herein."

The district court then, upon the same findings of fact, entered final judgment that the plaintiffs are not entitled to relief. We note particularly that all parties agreed that they have "had an opportunity to offer any and all evidence desired."

In the case of *Clark v. Thompson*, cited by the district court, a declaratory judgment had been entered, "That each of the three plaintiffs has a right to unsegregated use of the public recreational facilities of the City of Jackson." After that decision had been affirmed per curiam by this Court and certiorari denied by the Supreme Court, the zoo, parks, and all recreational facilities except the pools were opened to the use of whites and blacks alike. The pools were closed. The only evidence as to the reasons and motives for such closing is contained in affidavits of the Mayor and of the Director of the Department of Parks and Recreation. We quote from the Mayor's affidavit:

"Realizing that the personal safety of all of the citizens of the City and the maintenance of law and order would prohibit the operation of swimming pools on an integrated basis, and realizing that the said pools could not be operated economically on an integrated basis, the City made the decision subsequent to the Clark case to close all pools owned and operated by the City to members of both races. The City thereby decided not to offer that type of recreational facility to any of its citizens, and it has not done so and does not intend to reopen any of said pools.

"All other recreational facilities have been completely desegregated and have been made available to all citizens of the City regardless of race."

The Director's affidavit was to the same effect and was supplemented by a second affidavit stating the average annual operating expense and revenue of the pools for the

years 1960, 1961 and 1962, from which it appears that there was an average annual loss of \$11,700.00. The affidavit concluded: "that the City of Jackson would suffer a severe financial loss if it attempted to operate said pools, or any of them, on an integrated basis."

True, the City decided to close the pools rather than to operate them on an integrated basis. There was, however, no evidence that it reached that decision in an effort to impede further efforts to integrate. Nor did the court find any intent to chill or slow down the integration of other recreational facilities. To the contrary, as the Mayor's affidavit states, those were completely desegregated and made available to all citizens of the City regardless of race. The pools were closed because they could not be operated safely or economically on an integrated basis. Is that a denial of equal protection of the laws?

If so, then the plaintiffs must prevail, for "• • • law and order are not • • • to be preserved by depriving the Negro children of their constitutional rights."² Desirable as is economy in government and important as is the preservation of the public peace, "this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution."³ For that principle to be applicable, however, it must be held that the result of closing the pools because they cannot be operated safely or economically on an integrated basis deprives Negroes of the equal protection of the law. In our opinion that simply is not true.

The operation of swimming pools is not an *essential* public function in the same sense as the conduct of elections,⁴ the governing of a company town,⁵ the operation or

² Cooper v. Aaron, 1958, 358 U.S. 1, 16.

³ Buchanan v. Warley, 1917, 245 U.S. 60, 81.

⁴ Nixon v. Condon, 1932, 286 U.S. 73; Smith v. Allwright, 1944, 321 U.S. 649; Terry v. Adams, 1953, 345 U.S. 461.

⁵ March v. Alabama, 1946, 326 U.S. 501.

provision for the operation of a public utility,⁶ or the operation and financing of public schools.⁷

Under the impetus of the declaratory judgment in *Clark v. Thompson, supra*, the City was making the transition in the operation of its recreational facilities from a segregated to an integrated basis. It had considerable discretion as to how that transition could best be accomplished. Local authorities have the duty of easing the transition from an unconstitutional mode of operation to one that is constitutionally permissible. That has been held true as to the reapportionment of the state legislative bodies⁸ and as to the desegregation of the public schools.⁹ The Constitution does, however, require that the end result be constitutionally permissible.

The equal protection clause is negative in form, but there is no denying that positive action is often required to provide "equal protection." That is frequently true as to essential public functions. Other functions permit more latitude of action. As to swimming pools, which a city may furnish or not at its discretion, it seems to us that a city meets the test of the equal protection clause when it decides not to offer that type of recreational facility to any of its citizens on the ground that to do so would result in an unsafe and uneconomical operation.

There is, of course, no constitutional right to have access to a public swimming pool. No one would question that proposition in circumstances having no racial overtones; as, for example, where all citizens of a municipality are of

⁶ *Public Utilities Comm'n v. Pollak*, 1952, 343 U.S. 451; *Burton v. Wilmington Parking Authority*, 1961, 365 U.S. 715, 724; *Boman v. Birmingham Transit Co.*, 5 Cir. 1960, 280 F.2d 531; *Baldwin v. Morgan*, 5 Cir. 1961, 287 F.2d 750, 755.

⁷ *Brown v. Board of Education*, 1954, 347 U.S. 483, 493; *Guillory v. Tulane University*, E.D. La. 1962, 203 F.Supp. 855, 850, 863; *Hobson v. Hansen*, D.D.C. 1967, 269 F. Supp. 401.

⁸ *Reynolds v. Sims*, 1964, 377 U.S. 533.

⁹ *Brown v. Board of Education*, 1954, 347 U.S. 483; *Shuttlesworth v. Birmingham Board of Education*, N.D. Ala. 1958, 162 F.Supp. 372, 379, 381, *aff'd*, 358 U.S. 101.

the same race, the closing of all municipal pools would embody no unconstitutional action or result.¹⁰

Attempts to analogize this case to *Reitman v. Mulkey*, 1967, 387 U.S. 369, and *Griffin v. School Board of Prince Edward County*, 1964, 377 U.S. 218, offer little assistance. In *Reitman*, the Court held unconstitutional a recently adopted state constitutional amendment which declared that no agency of the state could interfere with the right of a property vendor or lessor to sell, rent or lease to anyone he chose. Considering the "purpose, scope, and operative effect" of the amendment, the Court stated that by, in effect, nullifying existing fair-housing laws, the state had adopted an affirmative policy of encouraging private discrimination. Significant state involvement in the private housing market, by prior regulation of fair-housing practices, supported the Court's conclusion. This case offers no circumstances involving the regulation of private activity, the abandonment of which can be transmuted into discriminatory state action. It is significant further that the subject facility here, public in nature, has ceased to exist, whereas the private facilities in *Reitman*, by their very identity and nature, of necessity continued to exist. The possibility that private pool owners in Jackson may operate segregated pools henceforth does not indicate any such state involvement in the past, present or future as could possibly require the application of the *Reitman* principles here.

In *Griffin*, the Court held as a violation of the equal protection clause the closing of all of the public schools of Prince Edward County, Virginia. The Court predicated its decision on two factors. Noting that none of the other counties in Virginia had closed their schools,¹¹ the Court

¹⁰ Arguments related to a due process or impairment of contract theory were foreclosed to plaintiffs by such cases as *Hunter v. Pittsburgh*, 1907, 207 U.S. 161, 177, 178. See in this regard, *Gomillion v. Lightfoot*, 1960, 364 U.S. 339, 342-43.

¹¹ On this point, Mr. Justice Black observed that "the Equal Protection Clause relates to equal protection of the laws 'between persons as such rather than between areas'," 377 U.S. at 230, but that Virginia law treated "the school children of Prince Edward County differently from the way it treats the school children of all other Virginia counties." *Id.*

pointed out that the state and county were supporting private, segregated schools with public funds, to the effect that, excluding one temporary expedient, "Prince Edward County school children, if they go to school in their own county, must go to racially segregated schools which, although designated as private, are beneficiaries of county and state support." 377 U.S. at 230-31. Pretermittting the question of swimming facilities available in other parts of Mississippi, on which there is no evidence, we see no involvement here of public funds applied to maintain any private swimming facilities.

The plaintiffs rely also on *Evans v. Newton*, 1966, 382 U.S. 296, but we do not think that case analogous. There the Court found that the public character of a purportedly private park required the park to be treated "as a public institution subject to the command of the Fourteenth Amendment," 382 U.S. at 302. "We only hold that where the tradition of municipal control had become firmly established, we cannot take judicial notice that the mere substitution of trustees instantly transferred this park from the public to the private sector." 382 U.S. at 301. In the case at bar, of course, there may well be inferred a "tradition of municipal control," but there the analogy must end. The city swimming pools in Jackson completely ceased to operate, whereas the parks in *Evans v. Newton* continued to operate, with the benefit of continued "municipal maintenance and concern." 382 U.S. at 301.

Appellants have urged a theory other than those suggested explicitly by *Reitman*, *Griffin* and *Evans*. We understood them to argue in terms of a protected right to be a free and equal citizen. We understood counsel in oral argument, as well as by written brief, to state that the issue here is whether the Constitution forbids the City of Jackson from withdrawing a badge of equality. The badge of equality, presumably, was the ability to swim in an integrated municipal swimming pool—the ability to enjoy, in an integrated fashion, recreational facilities operated by a municipality for its citizens. It cannot be disputed that were the badge of equality, here the ability to swim in an unsegregated pool, to be replaced by a

badge implying inequality—segregated pools, the municipality's action could not be allowed. However, where the facilities around which revolve the status of equality are removed from the use and enjoyment of the entire community, we see no withdrawal of any badge of equality.

Plaintiffs extend their argument, however, urging that white people in general are more affluent and thus have greater access to private swimming facilities.¹² Therein, it is said, lies a fatal aspect of the alleged removal of the badge of equality—plaintiffs, and the class they represent, will continue to suffer unequal treatment as a result of municipal action. In this context, the argument has little legal significance. The equal protection clause does not promise or guarantee economic or financial equality. In applying the requirements of the equal protection clause, this Court cannot require a city to operate a public swimming pool solely because the city's ceasing to do so forecloses the enjoyment by financially less fortunate citizens of recreational facilities available on a completely private basis to the more affluent.

Motive behind a municipal or a legislative action may be examined where the action potentially interferes with or embodies a denial of constitutionally protected rights. See, e.g., *Griffin v. School Board of Prince Edward County*, *supra*, and *Gomillion v. Lightfoot*, *supra*, n. 10. *Griffin*, *supra*, at 231, uses the expression that, "Whatever non-racial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional." That expression must not be lifted out of context. Read in connection with the attached footnote, the preceding part of the paragraph, and the paragraph which follows, it is clear that the Court was speaking of the kind of abandonment of public schools which would operate to continue racial

¹² One pool formerly leased by the City has subsequently been operated by the local Y.M.C.A. on a white-only basis. There is no evidence however, of any public involvement in the operation of that pool. See, e.g., *Evans v. Newton*, 1966, 382 U.S. 299, 302, citing *Terry v. Adams*, 1953, 345 U.S. 461; *Public Utilities Comm'n v. Pollak*, 1952, 343 U.S. 451; *Marsh v. Alabama*, 1946, 326 U.S. 501.

segregation. We do not read this statement to prohibit the City from taking race into consideration if not for an invidious or discriminatory purpose. The consideration of racial factors has been endorsed in cases of national defense,¹³ the operation of the public schools,¹⁴ and the selection of jurors.¹⁵ In dismissing this complaint, after considering the affidavits and testimony, the district court found that the City officials acted in the interest of preventing violence and preserving economic soundness to the City's operations. Even though such motive obviously stemmed from racial considerations, we know of no prohibition to bar the City from taking such factors into account and being guided by conclusions resulting from their consideration.

Motivation has been pointed out here as a positive indication of municipal policy. It has been suggested that the City has, in effect, adopted an official position that it would prefer to operate no pools rather than operate unsegregated pools. Without commenting on the soundness of the argument, we recognize that in the face of the substantial and legitimate objects which motivated the City's closing, to wit, the preservation of order and maintenance of economy in municipal activity, no such municipal policy can be inferred from the closing.

We agree with the district court that plaintiffs were not denied the equal protection of the laws by the closing of these swimming pools.

The judgment is Affirmed.

Chief Judge Brown, Judges Tuttle, Wisdom, Thornberry, Goldberg, and Simpson dissent reserving the right to file a dissenting opinion.

Judges Gewin, Coleman, Ainsworth, Godbold and Dyer, concur.

Judge Bell concurs in the result and specially reserving the right to file a concurring opinion.

¹³ *Hirabayashi v. United States*, 1943, 320 U.S. 81, 100.

¹⁴ *Shuttlesworth v. Birmingham Board of Education*, *supra*, n. 9; see also *Darby v. Daniel*, S.D. Miss. 1958, 168 F.Supp. 170, 186.

¹⁵ *Brooks v. Beto*, 5 Cir. 1966, 366 F.2d 1, 25.



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IN THE
Supreme Court of the United States

OCTOBER TERM, 1969

No. 1289

HAZEL PALMER, ET AL., *Petitioners,*

v.

ALLEN C. THOMPSON, Mayor, City of Jackson,
ET AL., *Respondents.*

**MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE**

Four black citizens of four cities in Mississippi hereby respectfully seek leave to file the attached brief *Amicus Curiae* in this case. The attorney for petitioners has consented; the attorney for respondents has refused consent.

The *Amici Curiae* are as follows: James Moore, Greenwood, Mississippi; C. O. Chinn, Canton, Mississippi; Willie Crump, Edwards, Mississippi; and Minnie McFarland, West Point, Mississippi. The issue involved in this suit, the closing of the public swimming pools in the City of Jackson after an order desegregating those pools had been obtained, is one of vital concern to them because a similar pattern of events has taken place in each of their cities. All four cities formerly had public swimming pools which were used by white people only, and which, after the

passage of the Civil Rights Act of 1964, and after attempts to integrate the pools, were closed or conveyed to private groups which continued the white-only policy.

In three of the cases, Greenwood, Canton and Edwards, there was litigation in which the *Amici* here were named plaintiffs representing the class of all black residents of those cities. In West Point, there was no litigation, but Mrs. McFarland is the mother of one of the boys who sought to integrate the pool on July 4, 1964.

Amici seek to file this brief in order to demonstrate the pervasive nature of the pattern of closing public facilities after attempts to integrate. By showing that the problem is not limited to the City of Jackson, and by showing that the practice of closing facilities is an integral part of a pattern of segregation, the *Amici* hope to show that this case is so important that this Court should grant review.

Respectfully submitted,

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BRIEF AMICUS CURIAE

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BRIEF AMICUS CURIAE

**THE INTEREST OF AMICI CURIAE IN
PALMER v. THOMPSON**

In 1963, the City of Jackson, Mississippi, was ordered to integrate its municipal swimming pools. *Clark v. Thompson*, 206 F.Supp. 539 (1963), *aff'd*, 313 F. 2d 637, *cert. den.*, 376 U.S. 951 (1963). The response of the City to that decision was to cease operating any of its five swimming pools. Four pools were closed and have remained closed since 1963; the City has no intention of reopening them. The fifth pool had been leased by the City, which terminated its lease, and the pool is operated by the Y.M.C.A. for whites only.

Black citizens of Jackson then filed suit to require the City of Jackson to reopen the pools. Relief was denied in the district court, and the denial was affirmed by the Fifth Circuit, both by a panel, and by the full court sitting en banc (six judges dissenting). *Palmer v. Thompson*, — F. 2d — (5th Cir. 1969). The black plaintiffs have now petitioned this Court for a writ of certiorari to review the en banc decision of the Fifth Circuit. This *Amicus* brief is filed by black residents of Canton, Edwards, Greenwood, and West Point, Mississippi, four other cities where black citizens have had similar problems gaining access to public swimming facilities. What has happened in Jackson, Mississippi, is not an isolated incident. To the contrary, it is part of an historical context and a contemporary strategy. Many other towns, particularly in Mississippi, are closing down their recreational facilities or otherwise taking steps in an attempt to thwart integration. The information concerning these cities is shown in the attached affidavits, and indicates the extent of the pattern shown in this case:¹

Canton: In Canton, Mississippi, thirty miles from Jackson, the town leased a municipal pool to a private all-white association. When the lease was declared void and the pool ordered desegregated in an unreported opinion by Judge Harold Cox, *Chinn v. Canton*, Cir. No. 3764 (S.D. Miss. Nov. 18, 1965), Canton closed the pool. It remains closed today. An appeal from that part of Judge Cox' decision of November 18, 1965, denying plaintiffs' application for an order prohibiting

¹ Affidavits setting forth the facts relating to *Amici's* four cities are attached hereto. These facts are of course not part of the record of this case, but they do go to show the importance of the issue involved and the reason why this Court should deem the issue of law to be one of sufficient magnitude to grant review.

Canton from closing the pools is pending in the United States Court of Appeals for the Fifth Circuit. *Chinn v. Canton*, No. 23229.

West Point: In West Point, Mississippi, when black children made use of a formerly all-white municipal pool, it was closed immediately and filled with dirt, a condition in which it remains to this day.

Edwards: In Edwards, Mississippi, the town has sold the pool that it operated for over twenty years to a "private" all-white club. Black citizens of Edwards sued to gain access to the pool but the district court found that the sale was legitimate. *White Town of Edwards*, Civ. No. 3937 (S.D. Miss. Sep. 9, 1966)

Greenwood: In Greenwood, Mississippi, the formerly all-white municipal pool was recently closed and the town has announced that it will not be reopened. That pool had been used for over thirty years by the white citizens of Greenwood. A suit is presently pending in the United States District Court for the Northern District of Mississippi to compel the town to reopen the pool. *Moore v. Henry*, No. GC 6938-S (N.D. Miss.).

Amici therefore realize that the outcome of *Palmer v. Thompson* will have a critical effect on our struggles for equality and justice in our own communities.

REASONS FOR GRANTING THE WRIT

The Importance of This Lawsuit

For the reasons set forth below *Amici* believe the Court of Appeals erred in affirming the denial by the District Court of Petitioners' application for an injunction. If that decision is not reversed, the practice of closing or of threatening to close public facilities

will become widespread. Thousands of people in many communities will feel the brunt of this strategy if it is not prohibited by this Court. Our own communities have already been affected by it. For the reasons set forth below black people throughout this Nation will be reluctant to seek through the courts the civil rights to which we are entitled, if the result is the closing of a public facility. The decision of the Court of Appeals thus poses a substantial threat to our civil rights and our civil liberties. This is why we are *Amici Curiae* in this suit; this is why it is important that this Court review that decision.

This case is important viewed from another perspective. The step taken by the City of Jackson in this case represents a new phase in the continuing fight for equality. What is of great significance is that it may very well mark the final stand that opponents of integration in public facilities can take. For it is clear that public facilities must be open to black and white alike. *Watson v. Memphis*, 373 U.S. 526 (1963). It is also clear that a city cannot avoid limitations imposed upon its facilities by the Equal Protection Clause by transferring the title to those facilities to private persons. *Evans v. Newton*, 382 U.S. 296 (1966). Neither can it place its weight of authority behind private discrimination, *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), nor encourage it. *Reitman v. Mulkey*, 387 U.S. 369 (1967). The cumulative practical effect of those decisions and a decision in this case reversing the Court of Appeals will be final victory in the struggle for equality and integration in public facilities. It will have taken three hundred and fifty years, an inestimable amount of litigation over the past sixteen years and not a little courage, but part

of the wall of racial separation that has stunted this Nation's growth for so long will have finally crumbled. Then, at least, we can say that all that has gone before has not been in vain.

The Error of the Court Below

I. THE CLOSING OF MUNICIPAL POOLS FOR THE DISCRIMINATORY PURPOSE OF AVOIDING COURT-ORDERED INTEGRATION CONSTITUTES A DENIAL OF THE EQUAL PROTECTION OF THE LAWS AS GUARANTEED BY THE FOURTEENTH AMENDMENT AND A BADGE OF SLAVERY PROHIBITED BY THE THIRTEENTH AMENDMENT.

If the pools were closed with the discriminatory purpose of preventing court-ordered integration and their use by black people, that act denied Petitioners equal protection of the law, *Griffin v. School Board of Prince Edward County*, 377 U.S. 218 (1964); *Hall v. St. Helena Parish School Board*, 197 F. Supp. 649 (1961) *aff'd.*, 368 U.S. 515 (1962), and imposed a badge of slavery, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), condemned by the Thirteenth Amendment itself. See Kinoy, "The Constitutional Right of Negro Freedom Revisited: Some First Thoughts on *Jones v. Alfred H. Mayer Co.*", 22 Rutgers L. Rev. 537 (1968).

This case was decided below as if it were a traditional factual dispute. Plaintiffs Palmer *et al.* [hereinafter "Petitioners"] alleged in their complaint that the pools were closed "for the purpose of excluding and continuing the exclusion of Negroes from the equal enjoyment" of the pools. One of the petitioners, Carolyn Stevens, asserted in her affidavit that there was "an unequivocal intention on the part of the chief executive of the City of Jackson to prevent integration of the races at public facilities of the City of Jackson

at whatever cost." See Affidavit, pp. 69-70 in Petition for Writ of Certiorari and Affiant's Exhibit "B", pp. 72-73 in Petition.

As against this, the only rebuttal presented by Defendants Thompson *et al.* [hereinafter "Respondents"] was in the form of two vague and conclusory statements by Mayor Thompson and Park Director Kurts. Thompson said the pools were closed because the city "realiz[ed] that the personal safety of all of the citizens of the City and the maintenance of law and order would prohibit the operation of swimming pools on an integrated basis, and . . . that the said pools could not be operated economically on an integrated basis." See Affidavit, p. 77 in Petition. Kurts claimed "that the City of Jackson would suffer a serious financial loss if it attempted to operate said pools, or any of them, on an integrated basis." See Affidavit, p. 75 in Petition. The District Court (W. Harold Cox, J.) accepted these reasons without question, as did seven judges of the Court of Appeals. The question is whether, in the circumstances of this case, the City of Jackson was entitled to have its bald assertions accepted so readily.

For the reasons set forth below, *Amici* believe the City bore the burden of proving its reasons, and of establishing that it had not acted simply to avoid integrating its pools. *Amici* further believe the City's conclusory statements were far from meeting that burden.

The history of the South is the story of white resistance to the mixing of the races. The story is replete with variations in strategy but is held together by one underlying theme: the desire to preserve the

wall of racial separation. The closing of swimming pools in Jackson, Mississippi, is but the latest device to achieve that end; it marks a new phase in a continuing struggle.

Slavery was, of course, the first stage of that struggle. It was bottomed on the "axiom in morals as well as in politics" that black people were "beings of an inferior order; and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect." *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857). And, in fact, slaves were not allowed to associate with whites. They had separate "living" facilities and were in all respects separated from the white world—except to serve it.

When slavery was abolished by the Thirteenth Amendment in 1865, the Southern states responded by passing the infamous Black Codes. Although the Codes were subsequently limited by the Fourteenth and Fifteenth Amendments, the white South nevertheless found it was able to get along quite well under the infamous "separate-but-equal" doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896).

In 1954, this Court declared that separate public schools were inherently unequal and thus violated the Equal Protection Clause of the Fourteenth Amendment. *Brown v. Board of Education*, 347 U.S. 483 (1954). Resistance to this decree on the part of racial separatists was entirely predictable. The strategies they employed are legendary and seemingly endless. A comprehensive survey of those tactics is made in 2 Emerson, Haber & Dorsen, *Political and Civil Rights in the United States* (Third Ed.) 1630-65. They in-

clude interposition resolutions, the Southern Manifesto, the use of force to block the entrance of blacks to state universities, and the use of police dogs to attack civil-rights demonstrators. As these not-so-subtle forms of resistance proved ineffective, the South turned to other avenues. The phrase "all deliberate speed" in *Brown v. Board of Education*, 349 U.S. 294 (1955), was interpreted by segregationists to mean all deliberation and no speed, and the notorious (and incorrect) dictum in *Briggs v. Elliott*, 132 F. Supp. 776, 777 (1955) ("The Constitution does not compel integration. It merely forbids discrimination.") became a rallying cry. The language of these two cases was twisted by school boards across the South to cloak their perpetuation of racial segregation in the guise of credibility. Other devices employed to prevent integration of public schools are collected in footnote 5 of Mr. Justice Douglas' concurring opinion in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 448 (1968). Finally, with this Court's decision this term in *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969), the focus of resistance to school integration has been on freedom-of-choice plans or laws (already largely outlawed precisely because such plans fail to break the wall of segregation) and on anti-bussing amendments to Congressional legislation. Like the closing of pools, anti-bussing legislation applies, on its face, equally to black and white and thus comes disguised as credible and neutral. Like the closing of pools, it is merely another contrivance to preserve the wall of racial separation.

Segregation in other public facilities was common, if not universal, until found to be in violation of the Equal Protection Clause. See, e.g., the cases collected

in *Emerson, Haber & Dorsen, supra*, at 1627-28, n. 4. Miscegenation statutes were used throughout the South, until *Loving v. Virginia*, 338 U.S. 1 (1967), to preserve the wall of racial separation in the marital relationship. Civil-rights workers were assaulted or killed, see *United States v. Price*, 383 U.S. 787 (1966), or otherwise harassed. See *Emerson, Haber & Dorsen, supra*, at 1646-7, n. 5. See also *Sobol v. Perez*, 289 F. Supp. 392 (1968).

In recent years, resistance has largely taken the form of attempting to divest government of title to property, *Evans v. Newton*, 392 U.S. 296 (1966), encouraging private discrimination, *Reitman v. Mulkey*, 387 U.S. 369 (1967) and making it more difficult to pass anti-discrimination legislation. *Hunter v. Erickson*, 393 U.S. 385 (1969). It has also taken the form of attempted economic retaliation, such as the Governor of Mississippi's recent vetoes of desperately needed Head Start programs in response to this Court's refusal in *Alexander* to countenance further delays in the desegregation of Mississippi school districts.

Nowhere in the United States has this unyielding resistance to racial desegregation been more evident than in Jackson, Mississippi. Opposition to racial mixing is *required* by Mississippi law. Section 4065.3 of the Mississippi Code requires that all state and local officials, expressly including mayors, take any steps necessary to prevent in public parks and public places of amusement, recreation or assembly, among other places, "a mixing or integration of the white and Negro races" caused "by any branch of the federal government." The statute further requires these state and local officials to prevent the implementation of any order by any agency of the federal government where

the order is based on the authority of *Brown v. Board of Education*, 347 U.S. 483 and 349 U.S. 294, and where the order causes "a mixing or integration of the white and Negro races" in public parks and public places of amusement, recreation or assembly, among others. The full text of Section 4065.3 is attached hereto.

The City of Jackson's opposition to racial mixing was recognized, indeed, in the very year the pools were closed, as a "steel-hard, inflexible, undeviating official policy of segregation." *United States v. City of Jackson*, 318 F.2d 1 (1963). It has also been recognized that the city officials of Jackson, including Mayor Thompson, seek to enforce that policy at all costs. See *NAACP v. Thompson*, 357 F.2d 831 (1966), where Mayor Thompson and other local officials had to be enjoined from denying black citizens the right to protest racial discrimination and from denying black citizens equal access to public facilities. See *Strother v. Thompson*, 372 F.2d 654 (1967), and *Guyot v. Pierce*, 372 F.2d 658 (1967), for other examples where Mayor Thompson and other local officials sought to prevent constitutionally protected activity of black citizens of Jackson which they feared would result in racial mixing.

It is thus well-established that Mayor Thompson and other local officials were required by law to oppose the implementation of the integration order issued by the United States District Court in *Clark v. Thompson*, *supra*, and that they had zealously and enthusiastically sought to enforce Section 4065.3 and its policy of racial separation even after the 1963 closing of Jackson's pools.

Nor was the City of Jackson alone in its actions with respect to swimming pools. In each of the hometowns

of *Amici*, the sequence of events is similar. See Affidavits attached hereto. In Edwards, the town operated an all-white pool for over twenty years and then sold it in 1965 for a price that was patently ridiculous. One of the reasons given for the sale was numerous complaints by "widows and elderly couples who did not have occasion to enjoy the use of the pool." The pool was sold to a club headed by the Mayor's brother, which club then operated the pool so as to deny membership only to black persons and white civil rights workers.

In Greenwood, the pool was operated on an all-white basis for over thirty years. Immediately after passage of the 1964 Civil Rights Act and after an attempt was made to integrate the pool, the City leased it to the Kiwanis Club. The Kiwanis Club denied blacks the use of the pool. A suit was commenced in August, 1969, to compel integration of the pool. It was announced in October, 1969, that the lease was cancelled and the pool was to be closed permanently.

In Canton, the city tried to lease its all-white pool in 1965 to a "private" association. Two days after the lease was declared null and void, black persons tried to use the pool but were told the pool was closed. The very next day the Mayor and Board of Aldermen passed a resolution closing all recreational facilities. Both the all-white pool and the all-black pool which the city also operated were closed and remained closed today.

In West Point, black citizens attempted, in 1965, to use a pool that had been used only by white persons. The City then closed the pool and filled it with dirt, a condition that remains today.

The pattern emerging from these incidents is clear. In the period between 1963 and 1965 it became increasingly evident to the officials of each of these towns that they would not be allowed to continue operating their pools on a segregated basis. They then tried to lease the pools to a "private club." If that proved unavailing the pools were then closed. In West Point, the middle step was simply omitted. The Jackson closing is simply one more in this pattern.

Given the historical context out of which this case arises; given the responses of other Mississippi communities when faced with integration of their public pools; given the Mayor's admitted opposition to integration (see Mayor Thompson's affidavit, p. 77 of Petition for Writ of Certiorari); given Section 4065.3 of the Mississippi Code, which *requires* Mayor Thompson and all other officials of Jackson to prevent the implementation of the integration order of the federal court in *Clark v. Thompson*; and given the other occasions where Thompson and others sought to fulfill the requirements of Section 4065.3, it is impossible to conclude that the closing of Jackson's pools was based on anything other than the specific discriminatory intention of preventing implementation of the integration order of *Clark v. Thompson* and of preventing racial mixing in the swimming pools.

A precisely analogous situation arose in *Johnson v. Branch*, 364 F.2d 177 (1966), where the Fourth Circuit Court of Appeals was called upon to determine the reason for a school board's firing of a black teacher. The board insisted that the firing was based on the plaintiff's inability to perform certain duties required of her in a prompt and cooperative manner. The plaintiff alleged the firing was the result of her involvement

in civil-rights activity in the community. What the Court of Appeals said there, in ordering the board to renew Mrs. Johnson's contract, applies equally to the City of Jackson here:

"In weighing the reasons offered by the Board to support its contention that it did not act arbitrarily, we cannot ignore the highly charged emotional background of a small eastern North Carolina community in the throes of a civil rights campaign where more than 51% of the population was Negro and where the two members of the board who voted against the plaintiff confessed to knowledge of her husband's activity and their opposition to school desegregation. *To accept such an analysis we would have to pretend not to know as judges what we know as men.* It is apparent on this record that absent the racial question, the issue would not have arisen. The only reasonable inference which may be drawn from the failure to renew Mrs. Johnson's contract in the fact of her splendid record of twelve years on such trivial charges was the Board members' objections to her racial activity." (Emphasis added.) 364 F.2d at 182.

Even if these circumstances are not thought to be conclusive, they do, at the very least, constitute a prima facie case of discrimination, which, under familiar lines of holdings in analogous areas of civil rights law, is enough to shift the burden of proof to the respondents and require them to present substantial and probative evidence that their actions were not based on illegitimate grounds.

Many courts have recognized that a long history of racial discrimination creates a presumption that official acts adversely affecting black persons were intended to discriminate against those persons. *See Rolfe v.*

County Board of Education of Lincoln County, 391 F.2d 77, 80 (1968); *Chambers v. Hendersonville City Board of Education*, 364 F.2d 189, 192 (1966); *Alabama State Teachers Ass'n v. Lowndes County Board of Education*, 289 F. Supp. 300, 305 (1968).

So also, in cases involving alleged jury discrimination, it has been the consistent holding of this Court that a history of racial discrimination in a particular location shifts the burden of proof with respect to the issue in a particular case to the prosecution. Furthermore, the burden is *not* satisfied by the mere assertion by public officials that there has been no discrimination. See, e.g., *Eubanks v. Louisiana*, 356 U.S. 584 (1958); *Reece v. Georgia*, 350 U.S. 85 (1955); *Avery v. Georgia*, 345 U.S. 559 (1953).

Again, this Court recently took a similar course in *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969), which involved the adoption of plans designed to abolish dual school systems. The history of school desegregation in Mississippi made it likely that any change suggested by a school board in a plan ordered by the Court of Appeals would in fact result in less integration. As a result this Court put the burden on the school boards to show that proposed changes in plans were constitutional, by providing that the Court of Appeals plan should be followed in all respects while the district court considered proposed changes.

Finally, compare Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, which, because of the history of southern states' use of voting laws to deny equal rights, creates a presumption in these states (including Mississippi) that any change in a voting law

adopted after November 1, 1964, will have a discriminatory purpose or effect, and therefore suspends any such change unless the state can carry its burden of proving that the change did not have such purpose and will not have such effect.

Similarly, the context and historical background of Jackson's pools requires a presumption that it was done solely to prevent implementation of the *Clark v. Thompson* order which would have lead to racial mixing. Such a presumption has not been rebutted by Respondents, who were unable to offer a shred of evidence to support the two excuses they offered. Furthermore, their allegations went not to past acts but were simply speculative predictions of the future. Under those circumstances, Respondents' allegations are entitled to no weight whatsoever. As in *Watson v. Memphis*, 373 U.S. 526, 537, this Court should not assume what might happen in the future if the facilities in question are integrated.

II. CLOSING MUNICIPAL POOLS IN RESPONSE TO A SUCCESSFUL LAWSUIT BY BLACK PEOPLE TO INTEGRATE THOSE POOLS CONSTITUTES AN IMPERMISSIBLE CHILLING EFFECT ON PETITIONERS' RIGHT TO PETITION FOR REDRESS OF GRIEVANCES AND THEIR FREEDOM OF EXPRESSION.

This Court has recognized that litigation is a form of political expression and a means of petitioning the government for a redress of grievances, and therefore is protected activity under the First Amendment. *NAACP v. Button*, 371 U.S. 415 (1964).

The closing of Jackson's pools under the circumstances of this case is a penalty for and a deterrent to such First Amendment activity. The closings were concededly a direct response to the efforts of black people in Jackson to desegregate the public pools that

were formerly all-white. They penalized black people for petitioning for desegregation of the pools in two ways. The results of the litigation were to deny black people the use and enjoyment of any public pool where previously there was one pool opened to them, and secondly, to engender animosity toward black people on the part of whites who formerly had the use of public pools but now have the use of none because of the desegregation litigation. These same two consequences act as deterrents to future litigation by black people seeking equality of treatment. The closings therefore have a chilling effect upon legitimate First Amendment activity, for the threat of sanctions may deter constitutionally protected activity almost as potently as the actual application of sanctions. *Domkowski v. Pfister*, 380 U.S. 479, 486 (1965); *NAACP v. Button*, 371 U.S. at 433.

It is of no constitutional moment if the impairment of First Amendment rights is an indirect result of governmental action or if it is unintended:

The fact that Alabama . . . has taken no direct action . . . to restrict the right of petitioner's members to associate freely, does not end inquiry into the effect of the production order. See *American Communications Association v. Douds*, 339 U.S. 382, 402. In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action. Thus in *Douds*, the Court stressed that the legislation there challenged, which on its face sought to regulate labor unions and to secure stability in interstate commerce, would have the practical effect of "discouraging" the exercise of constitutionally protected political rights." *NAACP v. Alabama*, 357 U.S. 449, 461 (1958).

Indeed "the governmental action challenged may appear to be totally unrelated to protected liberties." *NAACP v. Alabama*, 357 U.S. at 461. See also *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) and *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

In *Button*, this Court stated:

"Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. Just as it was true of the opponents of New Deal legislation during the 1930's, for example, no less it is true of the Negro minority today. *And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.*" (Emphasis added.) 371 U.S. at 429-30.

In the context of civil rights activity in Mississippi, deterring litigation has consequences of the gravest import. For it is a fact of life that in Mississippi in the year 1970, litigation remains virtually the only effective way to achieve the lawful objective of equality of treatment. If they are punished for seeking redress of their grievances in the only legal way that achieves results, where then can black people turn? The issue before this Court is thus whether the reasons advanced for the pool closings are constitutionally sufficient to justify their deterrent effect upon the critical and constitutionally protected activity of black people in this case.

The City alleged, first, that white opposition to pool integration posed a sufficient threat to the public safety to justify closing the pools. The Mayor's claim was simply a very general prediction. See Affidavit, p. 77 of Petition. It is entitled to exactly the same weight given a similar prediction in *Watson v. Memphis* where

the defendant, "beyond making general predictions, gave no concrete indication of any inability of authorities to maintain the peace . . . Moreover, there was no factual evidence to support the bare testimonial speculations that authorities would be unable to cope successfully with any problems which in fact might arise or to meet the need for additional protection should the occasion demand." 373 U.S. at 536-37. The prediction was therefore discounted. This Court's decisions in *Terminiello v. Chicago*, 337 U.S. 1 (1949), *Edwards v. South Carolina*, 372 U.S. 229 (1963), *Cox v. Louisiana*, 379 U.S. 536 (1965) and *Aaron v. McKinley*, 173 F. Supp. 944, *aff'd sub nom. Faubus v. Aaron*, 361 U.S. 197 (1959), make it clear that such an excuse is constitutionally inadequate here.

In *Terminiello* the defendant gave a controversial speech that resulted in several disturbances by an angry and turbulent crowd, disturbances that the police were not able to prevent. This Court held that the First Amendment precluded his conviction for disorderly conduct. In *Edwards v. South Carolina*, *supra*, this Court affirmed its position in *Terminiello* and pointed out that even the necessity for police protection fell far short of sufficient justification for impairment of protected expression. 372 U.S. at 237.

In *Cox v. Louisiana*, *supra*, the views expressed in *Terminiello* and *Edwards* were reiterated. The Court found that the "compelling answer" to an asserted justification for infringing First Amendment rights based on the presence of a hostile crowd of approximately two hundred persons and the necessity for police protection was that "constitutional rights may not be denied simply because of hostility to their exercise. *Watson v. Memphis*, 373 U.S. 526, 535." 379

U.S. at 551. And in *Aaron v. McKinley*, *supra*, the Court accepted fully a District Court's findings that violence would occur if public schools were integrated and, nevertheless, held unconstitutional a state statute authorizing their closing in that circumstance. 173 F. Supp. 944, 950, *aff'd sub nom. Faubus v. Aaron*, 361 U.S. 197 (1959).

Watson v. Memphis, *supra*, fully discredits Respondents' prediction of economic loss as justification for impairing the First Amendment rights of black people. Memphis sought to continue to deprive blacks of the equal use of city parks on the ground that integration would require a closing of some parks due to the additional expenses resulting from integration. The Court rejected this justification, first, because there had been only an allegation of increased costs, no showing of such. Secondly, the Court said: "More significantly, however, it is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them" 373 U.S. at 537.

There is further reason why the economic rationale given for closing the pools is insufficient justification.² In *Robinson v. Florida*, 378 U.S. 153 (1964), a Florida restaurant refused service to blacks solely on the basis of their race. The manager of the store testified that refusal was based on the economic factor, that serving blacks would be very detrimental to business, due to the objections of white customers. The question was whether the state was so involved with the refusal that it constituted a denial of equal protection within the meaning of the Fourteenth Amendment. This Court

² This applies equally to the law-and-order rationale as well.

found sufficient state involvement, as a matter of law, in a Florida health regulation that mandated separate restaurant facilities for blacks and whites. This Court said: "While Florida regulations do not directly and expressly forbid restaurants to serve both white and colored people together, they certainly embody a state policy putting burdens upon any restaurant which serves both races, burdens bound to discourage the serving of the two races together." 378 U.S. at 156. See also *Lombard v. Louisiana*, 373 U.S. 267 (1963) and *Peterson v. City of Greenville*, 373 U.S. 244 (1963). In the case at bar the State of Mississippi and the City of Jackson have a "steel-hard, inflexible, undeviating, official policy of segregation." See Section 4065.3 of the Mississippi Code and the discussion thereof (Point I, *supra*). That policy puts the same burden upon white people thinking about using an integrated pool as the Florida regulation put on restaurant owners considering integration of their restaurants. Like the Florida regulation, the Mississippi policy does not expressly and directly forbid racial mixing, but places psychological and economic burdens upon those whites who might otherwise accept integration.

Thus, the State of Mississippi and the City of Jackson have become significantly involved in any refusal by whites to make use of an integrated pool and in any resultant financial loss. Having itself played a significant role by reason of its official segregation policy in any such financial loss, the City cannot be heard to justify the closing of its municipal pools because of that loss. *Cooper v. Aaron*, 358 U.S. 1, 15-16 (1958).

III. CLOSING THE FORMERLY ALL BLACK POOL IN COLLEGE PARK WAS ARBITRARY AND CAPRICIOUS AND THEREFORE VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Due process of law means a person's liberty may not be interfered with, under the guise of protecting the public interest, by governmental action which is arbitrary or without reasonable relation to some purpose within the competency of that government to effect. *Weaver v. Palmer Bros., Co.*, 270 U.S. 402 (1926); *Meyer v. Nebraska*, 263 U.S. 390 (1923); *Adams v. Tanner*, 244 U.S. 590 (1917).

One of the four pools closed by the City in 1963 was the formerly all-black pool in College Park. Again, the reasons given by the City for the closings, including this particular closing, were the threat to public safety that the integration of the pools posed, and the financial loss that would accrue from integration, since whites would not use a pool open to blacks. Applying these criteria, *Amici* are at a loss to understand why the formerly all-black College Park pool was closed. If Respondents are correct, *i.e.*, if whites will not use a pool open to blacks, then, clearly, there will be no threat to public safety by keeping the all-black pool open. Notwithstanding any failure of whites to use the College Park pool, no financial loss will result to the City from implementation of the integration order *as it applies to that pool*, since virtually every black person who used the pool before the integration order will continue to use it, particularly if the other public pools are closed. In short, the integration order would have little or no effect upon the operation of that particular pool. The status quo would be maintained, nearly everyone using or not using the pool, as the case may be, exactly as before the order.

Given the inapplicability to the College Park pool of the criteria used by the City to close all four pools, the inescapable conclusion is that the closing of this particular pool was wholly arbitrary, capricious and unrelated to any legitimate governmental purpose. Said closing therefore violated the Due Process Clause of the Fourteenth Amendment. Petitioners are thus entitled to a reopening of this particular pool.

CONCLUSION

Therefore, because of the importance of this case to the Nation's well-being, because of the practical significance of this case to Petitioners, to *Amici Curiae*, to black people throughout the United States because of the threat to civil liberties that it poses, because of the importance of the constitutional issues presented, and because of our belief that they were incorrectly resolved below, we urge this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

C

APPENDIX

AFFIDAVIT OF JAMES MOORE

STATE OF MISSISSIPPI }
 COUNTY OF LEFLORE } ss.

Personally came and appeared before me, the undersigned authority, in and for the County and State of aforesaid JAMES MOORE, who after being duly sworn by me states upon his oath that:

1. That he is 39 years old, a black citizen of the United States, and a resident of Greenwood, Mississippi.

2. That for over thirty years the City of Greenwood owned and operated a swimming pool known as the Greenwood Swimming Pool.

3. That black persons were denied the use and enjoyment of said pool.

4. That on July 10, 1964, immediately after the passage of the 1964 Civil Rights Act and after an attempt was made to integrate the pool, the City of Greenwood leased it to the Kiwanis Club.

5. That the lease was for \$10.00 per year.

6. That the Kiwanis Club denied black persons the use and enjoyment of the pool.

7. That in August 1969, affiant and others filed suit to enforce their right to use the pool. *Moore v. Henry*, Civ. No. GC6938-S (N.D.Miss.).

8. That in October, 1969, the lease was cancelled, and the City announced that the pool was being closed permanently.

/s/ JAMES MOORE

Sworn to and Subscribed before me, this 23rd day of March, 1970.

/s/ ALIX H. SANDERS
Notary Public

My Commission expires Nov. 7, 1973.

AFFIDAVIT OF MRS. WILLIE CRUMP

COUNTY OF HINDS }
STATE OF MISSISSIPPI } ss.

Personally came and appeared before me, the undersigned authority, in and for the County and State of aforesaid WILLIE V. CRUMP, who after being duly sworn by me states upon her oath that:

1. That she is 50 year old, a black citizen of the United States, and a resident of Edwards, Mississippi.

2. That from 1944 to 1965 the City of Edwards operated a concrete swimming pool and tennis courts free to town residents.

3. That no black persons used the pools in the years between 1944 and 1965.

4. That in 1965 the City of Edwards sold the property on which the pool and tennis courts were located to the Edwards Recreation Club. The property was sold for only \$2,000, although it was larger than a football field, was graded and sodded and included the swimming pool and the tennis courts.

5. That the Mayor testified that the sale was made because of numerous complaints by "widows and elderly couples who did not have occasion to enjoy the use of the pool" and because of its excessive operating costs, although there were no complaints about costs when the City spent \$4,000, for repairs of the pool in 1948.

6. That the Edwards Recreation Club purported to operate the pool as a so-called private club but denied membership only to black persons and white civil rights workers.

7. That the President of the Edwards Recreation Club was the brother of the Mayor of Edwards.

8. That membership in the Club is still denied today to black persons and white civil rights workers.

3a

9. That black citizens of Edwards believe that under these circumstances they have the legal right to the use of this pool, without regard to who possesses title to it.

10. That these black citizens are reluctant to seek to gain admission to the pool. This reluctance is based on the fear that if the federal courts order the pool desegregated, the pool will be closed.

/s/ WILLIE V. CRUMP

Sworn to and subscribed before me, this 23rd day of March, 1970.

/s/ MRS. MAY ELIZABETH COX
Notary Public

My Commission Expires Oct. 21, 1972.

AFFIDAVIT OF C. O. CHINN, SR.

COUNTY OF MADISON }
STATE OF MISSISSIPPI } ss.

Personally came and appeared before me, the undersigned authority, in and for the County and State of aforesaid C. O. Chinn, who after being duly sworn by me states upon his oath that:

1. That he is 51 years old, a black citizen of the United States, and a resident of Canton, Mississippi.

2. That for many years the City of Canton owned and operated through its Department of Parks and Recreation two parks, each with a swimming pool and bathhouse. Both parks and both pools had been operated, controlled, administered and supervised on a racially segregated basis. Black people were denied access to, and the use and enjoyment of the Canton Park and Recreation Center and its pool.

3. That on May 18, 1965, the Mayor of Canton leased the pool in the Canton Park and Recreation Center to the Canton Swim Association, a private group that denied all blacks the use and enjoyment of the pool.

4. That on June 28, 1965, said lease was declared null and void by the United States District Court for the Southern District of Mississippi. The City was ordered to operate the pool on a desegregated basis.

5. That on June 30, 1965, C. O. Chinn, Jr. and others black persons came to the park but were told by the Assistant Chief of Police that the pool was closed indefinitely.

6. That the Assistant Chief of Police ordered them to leave, which they did.

7. That on July 1, 1965, a special meeting of the Mayor and the Board of Aldermen of Canton was held, at which meeting a resolution was passed purporting to abolish the Department of Parks and Recreation, discontinue all recre-

ational programs, close all recreational facilities, and close all streets in the parks.

8. That the municipal pools remain closed today.

9. That black citizens have brought suit to compel the City of Canton to reopen its parks and pools on an integrated basis.

10. That affiant is a plaintiff in said suit, which is Chinn v. City of Canton, No. 23229 in the Court of Appeals, Fifth Circuit.

/s/ C. O. CHINN

Sworn to and subscribed before me, this 24 days of March, 1970.

/s/ SARAH HARVEY STEARN
Notary Public

My Commission Expires May 9, 1970.

AFFIDAVIT OF MINNIE L. McFARLAND

STATE OF MISSISSIPPI
COUNTY OF CLAY

Personally came and appeared before me, the undersigned authority, in and for the County and State aforesaid Minnie L. McFarland who after being duly sworn by me states on her oath that:

- (1) That she is 42 years of age, a Black citizen of the United States, and a resident citizen of West Point, Mississippi.
- (2) That, prior to July 4, 1964, the city of West Point owned and operated a municipal pool on a segregated basis.
- (3) That on July 2, 1964 the Civil Rights Act went into effect.
- (4) That on or about July 4, 1964, Black citizens of West Point attempted to make use of the municipal pool to which only white persons had formerly been admitted.
- (5) That on or about September 1, 1964, and after and pursuant to the aforesaid attempt at utilization the pool was closed and further that on or about July 1, 1966 the city filled the pool with dirt.
- (6) That the pool remains closed today.

Signed MINNIE McFARLAND

Sworn to and subscribed before me, this the 24th day of March, 1970.

LOUIS G. DAVIS
Notary Public.

My commission expires
May 7, 1973.

MISSISSIPPI CODE**§ 4065.3. Compliance with the principles of segregation of the races.**

1. That the entire executive branch of the government of the State of Mississippi, and of its subdivisions, and all persons responsible thereto, including the governor, the lieutenant governor, the heads of state departments, sheriffs, boards of supervisors, constables, mayors, boards of aldermen and other governing officials of municipalities by whatever name known, chiefs of police, policemen, highway patrolmen, all boards of county superintendents of education, and all other persons falling within the executive branch of said state and local government in the State of Mississippi, whether specifically named herein or not, as opposed and distinguished from members of the legislature and judicial branches of the government of said state, be and they and each of them, in their official capacity are hereby required, and they and each of them shall give full force and effect in the performance of their official and political duties, to the Resolution of Interposition, Senate Concurrent Resolution No. 125, adopted by the Legislature of the State of Mississippi on the 29th day of February, 1956, which Resolution of Interposition was adopted by virtue of and under authority of the reserved rights of the State of Mississippi, as guaranteed by the Tenth Amendment to the Constitution of the United States; and all of said members of the executive branch be and they are hereby directed to comply fully with the Constitution of the State of Mississippi, the Statutes of the State of Mississippi, and said Resolution of Interposition, and are further directed and required to prohibit, by any lawful, peaceful and constitutional means, the implementation of or the compliance with the Integration Decisions of the United States Supreme Court of May 17, 1954 (347 US 483, 74 S Ct 686, 98 L ed 873) and of May 31, 1955 (349 US 294, 75 S Ct 753, 99 L ed 1083), and to prohibit by any lawful, peaceful, and constitutional means, the causing of a mixing

or integration of the white and negro races in public schools, public parks, public waiting rooms, public places of amusement, recreation or assembly in this state, by any branch of the federal government, any person employed by the federal government, any commission, board or agency of the federal government, or any subdivision of the federal government, and to prohibit, by any lawful, peaceful and constitutional means, the implementation of any orders, rules or regulations of any board, commission or agency of the federal government, based on the supposed authority of said Integration Decisions, to cause a mixing or integration of the white and Negro races in public schools, public parks, public waiting rooms, public places of amusement, recreation or assembly in this state.

2. The prohibitions and mandates of this act are directed to the aforesaid executive branch of the government of the State of Mississippi, all aforesaid subdivisions, boards, and all individuals thereof in their official capacity only. Compliance with said prohibitions and mandates of this act by all of aforesaid executive officials shall be and is a full and complete defense to any suit whatsoever in law or equity, or of a civil or criminal nature which may hereafter be brought against the aforesaid executive officers, officials, agents or employees of the executive branch of State Government of Mississippi by any person, real or corporate, the State of Mississippi or any other state or by the federal government of the United States, any commission, agency, subdivision or employee thereof.



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JOHN F. DAVIS, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1969

No. ~~1969~~ 107

HAZEL PALMER, ET AL, *Petitioners*,

vs.

ALLEN C. THOMPSON, MAYOR, CITY OF
JACKSON, ET AL, *Respondents*.

**OBJECTIONS OF RESPONDENTS TO MOTION FOR
LEAVE TO FILE BRIEF AMICUS CURIAE**

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Jackson, Mississippi
Attorneys for Respondents.

STATE OF NEW YORK
IN SENATE
JANUARY 18, 1907.

REPORT

OF THE

COMMISSIONERS OF THE LAND OFFICE.

1906.

ALBANY:

WILLIAM H. BROWN, COMMISSIONER.

JOHN W. BROWN, CLERK.

THE STATE OF NEW YORK.

1906.

ALBANY: W. H. BROWN, COMMISSIONER.

JOHN W. BROWN, CLERK.

THE STATE OF NEW YORK.

ALBANY: W. H. BROWN, COMMISSIONER.

JOHN W. BROWN, CLERK.

THE STATE OF NEW YORK.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1289

HAZEL PALMER, ET AL, *Petitioners,*

vs.

ALLEN C. THOMPSON, MAYOR, CITY OF
JACKSON, ET AL, *Respondents.*

**OBJECTIONS OF RESPONDENTS TO MOTION FOR
LEAVE TO FILE BRIEF AMICUS CURIAE**

Respondents respectfully object to the motion filed herein by James Moore, C. O. Chinn, Willie Crump and Minnie McFarland for leave to file a brief as amicus curiae herein and submit the following reasons for withholding consent:

1. This is an effort to inject into this case alleged factual situations involving the towns of Greenwood, Canton, Edwards and West Point, Mississippi, which are no way involved in this case. The factual situations presented are wholly outside the record in the present case and will not be considered by this Court in the disposition of the present case. *Knetsch v. United States* (1960) 364 U.S. 361, 81 S.Ct. 132, 5 L.Ed.2d 128.

2. The motion does not state that either the facts or questions of law involved in the present case have not or will not be adequately presented by the parties.

3. Persons should not be permitted to appear amicus curiae who are obviously partisan. 3 *C.J.S.*, Amicus Curiae,

Sec. 2(c), p. 1047; *Universal Oil Products Co. v. Root Refining Co.*, 66 S.Ct. 1176, 328 U.S. 575, 90 L.Ed. 1447.

For the above reasons we respectfully submit that the motion for leave to file brief amicus curiae should be denied.

Respectfully submitted,

JOHN E. STONE
City Attorney
City Hall
Jackson, Mississippi

THOMAS H. WATKINS
Suite 800 - Bankers Trust Plaza Bldg.
Jackson, Mississippi

ELIZABETH W. GRAYSON
Suite 800 - Bankers Trust Plaza Bldg.
Jackson, Mississippi
Attorneys for Respondents.

CERTIFICATE OF SERVICE

The undersigned of counsel certifies that a true and correct copy of the foregoing Objections of Respondents to Motion for Leave to File Brief Amicus Curiae was this day mailed by United States mail, postage prepaid, to the following:

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Detroit, Michigan 48226

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Attention: Mr. William Kuntsler
588 Ninth Avenue

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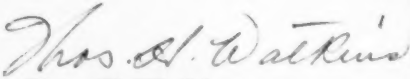
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John Thames
Thomas Mayfield
206 East Jordan Avenue
West Point, Mississippi

Attorneys for the West Point Amicus Curiae.

This 7th day of April, 1970.


Thos. H. Watkins,
Of Counsel for Respondents.

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1970

No. 107

HAZEL PALMER, *et al.*,

Supreme Court, U.S.

FILED

JUL 21 1970

E. ROBERT SEAVER, CLERK

Petitioners,

—V.—

ALLEN C. THOMPSON, Mayor, City of Jackson, *et al.*,

Respondents.

BRIEF FOR PETITIONERS

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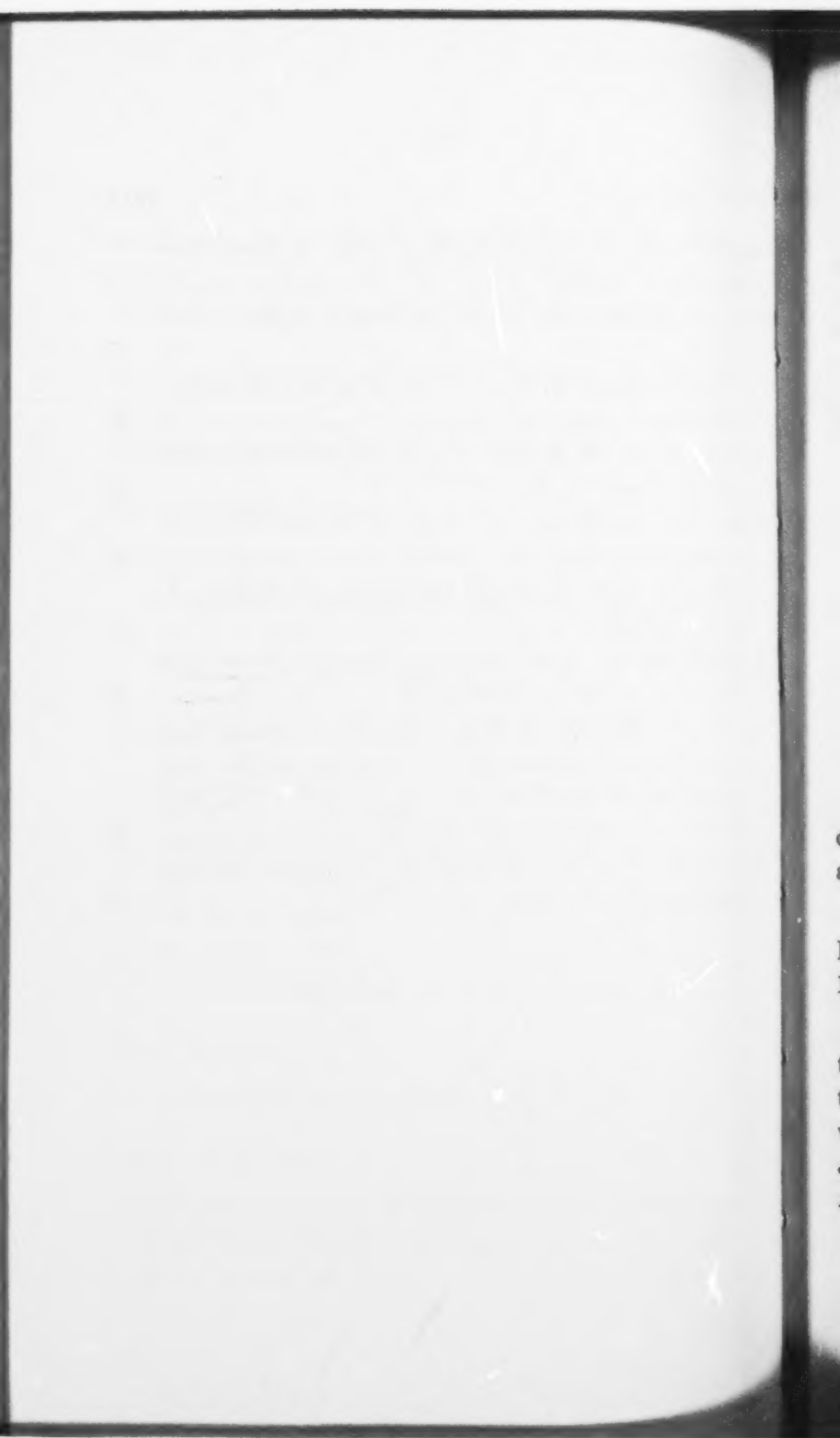
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Supreme Court of the United States

OCTOBER TERM, 1970

No. 107

HAZEL PALMER, *et al.*,

Petitioners,

—v.—

ALLEN C. THOMPSON, Mayor, City of Jackson, *et al.*,

Respondents.

BRIEF FOR PETITIONERS

Opinions Below

The letter-opinion, and findings of fact and conclusions of law of the district court are reproduced in the Appendix at 23-31.

The original opinion of the three-judge panel of the Fifth Circuit Court of Appeals was entered on August 29, 1967, and is reported at 391 F.2d 324 (A. 34).

The three opinions on rehearing *en banc* are reported together at 419 F.2d 1222. The majority opinion was entered on October 9, 1969, the dissenting opinion on November 25, 1969, and the special concurring opinion on January 7, 1970. These opinions are reproduced in the Appendix at 44, 56, and 55, respectively.

Jurisdiction

The judgment of the Court of Appeals was entered on October 9, 1969, and the time in which to file a petition for certiorari was extended by Mr. Chief Justice Warren Burger to March 8, 1970. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1254(1). The petition for certiorari was granted by this Court on April 20, 1970, — U.S. —, 90 S. Ct. 1364 (1970).

Statutes and Constitutional Provisions Involved

AMENDMENT XIII

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

UNITED STATES CODE, TITLE 42

§1981. Equal rights under the law.

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

• • • • •

§1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other property proceedings for redress.

Question Presented

Where the City of Jackson, Mississippi, has historically maintained a "steel hard, inflexible, undeviating official policy of segregation" and where this policy has been manifested, among other ways, by denying blacks access to public swimming facilities provided for whites and where, as a result of legal action brought by black citizens of Jackson, the federal court has ordered these facilities to be operated only on an integrated basis, did the city's action in closing these swimming facilities to avoid the integration order violate rights guaranteed the black people of Jackson under the Thirteenth and Fourteenth Amendments, and 42 U.S.C. §1981?

Statement of the Case

The City of Jackson and the State of Mississippi have for many years maintained a "steel-hard, inflexible, undeviating official policy of segregation," *United States v. City of Jackson*, 318 F.2d 1, 5 (5th Cir. 1963). This is the single most important fact¹ in the present case, and provides the backdrop for the events which led to the institution of this litigation.

Respondents, the Mayor and other public officials of the City of Jackson, are bound by Mississippi law² to resist

¹ This statement is deliberately made here and not in the "argument" section of the brief, for we do not consider it either an opinion or a legal argument, but a matter of historical fact. Most Americans deplore this state of affairs; some Americans hail it—but no one who had read a newspaper in the last ten years doubts that it is indeed a fact.

² See Miss. Code §4065.3, the full text of which is reproduced in the Appendix to the Brief Amicus Curiae of James Moore, et al., at 7a.

integration in all public places, and to interfere, whenever possible, with the integration orders of any branch of the federal government. A statement of the present case is indeed no more than a history of how the public officials of Jackson faithfully carried out this State policy, in an attempt to prevent integration of the municipal swimming and wading pools at all costs.

Prior to 1962, all public recreational facilities operated by the City of Jackson were operated on a segregated basis, including the swimming and wading pools involved in this case (A. 7-14). A group of black citizens brought suit to integrate these facilities, and obtained a declaratory judgment in *Clark v. Thompson*, 206 F. Supp. 539 (S.D. Miss. 1962); *aff'd*, 313 F.2d 637 (5th Cir., 1963); *cert. denied*, 375 U.S. 951 (1963). As both courts below found, and as the respondents freely admit (second Kurts affidavit, A. 18; Thompson affidavit, A. 21), the municipal swimming pools were closed after this decision, and solely because of it. The majority below found that "the City decided to close the pools rather than to operate them on an integrated basis" (A. 47),³ while the concurring opinion went even further and said that "it may not be disputed, that the closings here were racially motivated" (A. 56).

In May of 1963, shortly after the affirmance of *Clark* by the Fifth Circuit Court of Appeals, and as the summer season approached, Mayor Thompson, by his public statements and actions made it clear that, even if integration had to be tolerated in some public facilities, the swimming and wading pools would never be integrated. Some of

³ The extent of the majority's concession of the racial motivation behind the closing of the pools can be seen in its startling introductory phrase "[E]ven though such motive obviously stemmed from racial considerations. . . ." (A. 54).

these statements are gathered together in Appendix B to the affidavit of Carolyn Stevens (A. 15-16). As the *Jackson Daily News* reported, for example, "Thompson said neither agitators nor President Kennedy will change the determination of Jackson to retain segregation" (A. 16).

On May 27, 1963, a group of black citizens met with the Mayor and other officials, in an attempt to insure that the desegregation orders of the federal courts would be honored (A. 4-5). Instead, only three days later the Mayor announced that the pools would not open "due to some minor water difficulty" (A. 5). In point of fact, there was no "water difficulty," for, as the Mayor himself later stated in an affidavit filed in this case, "the City made the decision subsequent to the *Clark* case to close all pools owned and operated by the City to members of both races" (A. 21). The pools remain closed to this date, and according to the Mayor's own affidavit, it is the intention of the City of Jackson to keep them closed forever, rather than operate them on an integrated basis (A. 21).⁴

Shortly after the pools were closed, the City divested itself of the one pool which it had leased rather than owned, Leavell Woods, and turned it over to the Southwest Branch of the YMCA. The YMCA immediately began to operate this pool on a white-only basis—an operation made possible only because of the City's action (A. 5-6). Respondents must have known that the pool would be operated on such a segregated basis once it reached a segregated YMCA.⁵

⁴ However, the City is maintaining all of the pools owned by it (A. 17). Thus, petitioners and the members of their class are supporting through their taxes waterless pools which they cannot use.

⁵ See ¶15, affidavit of Carolyn Stevens, A. 6.

The present suit was filed as a class action after efforts by the black community to have the pools reopened failed. It was in response to this suit that the city officials—for the first time—claimed that the closing of the pools was necessary to maintain public order, and because it would be uneconomical to operate the pools on an integrated basis (Affidavits of Kurts and Thompson, A. 16-22).

The record contains no proof whatsoever of either of these claims, only two self-serving and wholly conclusory affidavits (A. 16-22). The Mayor's affidavit baldly states that the City "realized" that public safety would be endangered by the operation of integrated pools, and "realized" that such operation would be uneconomical. There is no discussion of threats of violence, of actual disorders, or any elaboration of how the "personal safety" of anyone would be adversely affected if the pools were opened on an integrated basis. There is no prediction that black youths would assault white swimmers or that white citizens would attempt to prevent blacks from using the pools. Still less, of course, is there any evidence that any such incidents actually occurred, since the pools never were integrated. Nor is there any reason to believe that such incidents—if they had occurred—could not have been handled adequately by Jackson's police force. Mayor Thompson offered no evidence on economic matters.

The affidavits of George Kurts, Director of the City Parks, add nothing to the assertion that the public safety was endangered, and little to the claim that the pools would be uneconomic to operate *on an integrated basis*. To the contrary, his first affidavit reveals that they were operated at a loss *even when segregated* (A. 17), and there is no indication whatsoever that the pools would lose more money,

or, indeed, lose any money at all, if integrated. There is no discussion of whether it would be feasible to operate only certain of the pools, or whether it would make economic sense to raise or lower slightly the price of admission to the pools. Significantly, no explanation was offered as to why it was economically possible to operate all of the other public facilities in the City on an integrated basis, but "a serious financial loss" would result from such operation of the swimming pools in particular. Also left unproved was the question of how "serious" the financial loss would be, and how that loss would compare to those sustained by the City in other public endeavors.

Respondents presented *no other evidence*^{*} to rebut the presumption⁷ that the closing of the pools was for a discriminatory purpose and solely to avoid the effects of *Clark v. Thompson*. After a hearing on petitioners' motion for temporary relief, however, the District Court denied relief in a letter-opinion of September 14, 1965 (A. 23). By stipulation of the parties (A. 32), no further evidence was adduced, and the District Court rendered its final finding of facts and conclusions of law on the record as it then stood (A. 27). The Court's findings of fact were taken directly from the answer and affidavits of the respondents.

On appeal to the Fifth Circuit Court of Appeals, a three-judge panel affirmed the decision below, accepting without question the findings of fact, 391 F.2d 324 (A. 34). Subsequently the Court of Appeals, on its own motion,

^{*} As the majority below noted, the respondents stipulated that they had had "an opportunity to offer any and all evidence desired." (A. 46. The stipulation is at A. 32.)

⁷ Cf. *Watson v. City of Memphis*, 373 U.S. 526 (1963) and *Chambers v. Hendersonville City Board of Education*, 364 F.2d 189 (4th Cir. 1966), discussed more fully *infra*.

ordered a rehearing *en banc* (A. 44). The rehearing resulted in three separate opinions, all reported at 419 F.2d 1222, and reproduced in the Appendix, beginning on page 44.

The majority of seven judges, again accepting the lower court's findings of fact, held that the closing of the pools was justified. The concurring opinion, joined by the entire seven-judge majority, clarified the majority opinion by stating that although the closings were "racially motivated," that, in itself, was not evidence of a "racially discriminatory purpose." The concurring opinion specifically put the burden of proof on petitioners, instead of putting the City to the burden of proving *lack* of discriminatory intent.

Six judges dissented in an opinion written by Judge Wisdom. The dissent rejected completely the excuses offered by the respondents, and thus rejected the district court's findings of fact. The dissent argued that racial motivation was *inherently* discriminatory, regardless of the fact that the pools were closed to white citizens as well as black.

This Court granted a petition for a writ of certiorari, to review the decision of the Fifth Circuit, — U.S. —, 90 S. Ct. 1364. More than seven years after a federal court declared that Jackson's swimming pools should be integrated, and more than fifteen years after *Dawson v. Mayor and City Council of Baltimore*, 350 U.S. 877 (1955), this Court will finally have the opportunity to say whether City officials may frustrate that decision by the simple expedient of closing the pools entirely.

Summary of Argument

I.

Violation of the Fourteenth Amendment.

A. The sole reason for closing the pools was to avoid the integration orders of *Clark v. Thompson*. The excuses of safety and economy are mere smokescreens, based entirely upon the unsupported speculations of City officials. The courts below committed clear error when they accepted these excuses as matters of fact, since in cases dealing with racial prejudice, a community with a long history of opposition to integration has the burden of proving its *lack of* discriminatory intent.

B. If the sole reason for the closing of the pools was indeed to avoid integration, the closings are obviously illegal and a violation of the Equal Protection Clause. *Evans v. Newton*; *Evans v. Abney*; *Griffin v. County School Board of Prince Edward County*.

C. Even if it is true that integrating the pools would be in some degree unsafe or economical, that is still no justification for their closing, if the result is to deny the facilities to black citizens. *Buchanan v. Warley*; *Cooper v. Aaron*; *Watson v. City of Memphis*.

D. The argument that the closings affect black and white citizens alike, and, therefore, do not discriminate against blacks, is a betrayal of the "inherently unequal" theory of *Brown v. Board of Education*, and a return to the repudiated separate-but-equal theory of *Plessey v. Ferguson*.

E. By closing the public pools and leaving the way open for private pools to operate on a segregated basis, and by directly facilitating the white-only operation of the Leavell Woods pool by the YMCA, the City of Jackson has put its power and prestige behind private discrimination, and involved the State to an unconstitutional degree.

II.

Violation of 42 U.S.C. §1981.

Black citizens successfully brought suit to integrate the municipal swimming pools in *Clark v. Thompson*. The City's response was to close the pools altogether, leaving the successful plaintiffs in a worse position than they had been in before the suit, when they, at least, had one segregated pool in which to swim. By punishing black citizens for using the federal courts, the City has denied to them the same free access to the courts "as is enjoyed by white citizens," and thus violated §1981. Punishment for successful litigation also chills the right to resort to legal processes in the future.

III.

Violation of the Thirteenth Amendment.

The theory of the City of Jackson in closing the pools was that black people are inferior, and, therefore, altogether unfit to swim together with white people. This ideology of racial inferiority was the bedrock axiom of slavery and of *Dred Scott*, and was therefore eradicated by the Thirteenth Amendment.

This Court must decide whether to allow the City of Jackson thus to impose a badge of slavery, or whether it

will stand firm by the promise of the Thirteenth Amendment, as it did in *Jones v. Alfred H. Mayer Co.*

ARGUMENT

I.

The decision below violates the Fourteenth Amendment.

A. *The Sole Reason for Closing the Municipal Swimming Pools Was to Prevent Integration.*

Starkly presented, the nub of this case is that the City of Jackson, rather than face the seemingly horrendous prospect of black and white bodies bathing together in its swimming pools, decided to close those facilities entirely. While this may be pointedly analogous to the old saw about cutting off one's nose to spite one's face, it is perhaps the logical last resort of Mississippi's and the City's "steel-hard, inflexible, undeviating, official policy of segregation." *United States v. City of Jackson*, 318 F.2d 1, 5 (5th Cir. 1963). Faced with the fall, one by one, of its barriers against what it euphemistically refers to as "mixing,"^{*} that state and, in particular, its capital city, have retreated to a final line of defense—to close certain "delicate" public facilities rather than operate them on an integrated basis.

One hardly needs "long exposure to obvious and non-obvious racial discrimination" (A. 56) to see through the twin excuses offered by respondents (and accepted at face value by both the district court and the majority below).

^{*} See, e.g., *United States v. City of Jackson*, and *Clark v. Thompson*, both *supra*. See also the cases cited in footnotes 18 and 23, pp. 19 and 24 respectively, *infra*.

As Circuit Judge Rives himself pointed out in the majority opinion,

Nor did the [district] court find any intent to chill or slow down the integration of *other recreational facilities*. To the contrary, as the Mayor's affidavit states, those were completely desegregated and made available to all citizens of the City regardless of race (A. 47). (Emphasis added.)

But bodies do not touch on such "other recreational facilities" as golf courses, tennis courts or playground swings—they do in swimming pools. The racial paranoia that lies behind segregation as an institution is nowhere more virulent than where physical contact between the races is involved.⁹ The City's justification, which passed muster with the courts below, is nothing more or less than desperate nonsense to support the unsupportable.

Significantly, the majority below conceded that "the City's decision to close the pools" stemmed from racial considerations (A. 54).¹⁰ In his concurring opinion, Circuit Judge Bell put it even plainer. "We can easily surmise, indeed it may not be disputed, that the closings here were

⁹ The sexual phobia generated by the possibility of even accidental physical contact between lightly clad black and white bodies in swimming pools, and which lies back of the Mayor's self-fulfilling prophecy, is part and parcel of the racial mythology that has done so much to divide us as a people. See e.g., W. S. Cash, *The Mind of the South*, Doubleday Anchor (A. 27), New York, N. Y. (1941); George W. Cable, *The Negro Question*, Doubleday Anchor (A. 144), New York, N. Y. (1958); C. Vann Woodward, *Reunion and Reaction*, Doubleday Anchor (A. 83), New York, N. Y. (1954); and the novels of William Faulkner.

¹⁰ The majority's reliance on *Brooks v. Beto*, 366 F.2d 1 (5th Cir. 1966) is sadly misplaced. There, "racial considerations" were utilized to *undo* the effects of segregation, whereas here the effect is to forever *perpetuate* injustice.

racially motivated" (A. 56). Indeed, no fair-minded person could, after reading the record, even in a light most favorable to respondents, come to any other conclusion than that the closing of the pools was, as Mayor Thompson himself put it in his affidavit, to prevent their being operated "on an integrated basis" (A. 21).¹¹

The intimation by Circuit Judges Rives and Bell that "racial discrimination" as distinguished from "racial motivation," could have been discovered by "a full evidentiary hearing" below (A. 56), makes no sense whatsoever if, as we urge and this Court has so often stated, the terms are synonymous in a constitutional sense.¹² Actions that are the result of "racial motivations" are *per se* discriminatory insofar as black people in this country are concerned. *Brown v. Board of Education*, 347 U.S. 483 (1954); *Griffin v. County Board of Prince Edward County*, 377 U.S. 218

¹¹ In *Johnson v. Branch*, 364 F.2d 177 (4th Cir. 1966), *cert. denied*, 385 U.S. 1003 (1966), the Fourth Circuit rejected a myriad of reasons given by a North Carolina school board to justify its failure to rehire a black teacher, on the ground that "to accept such an analysis we would have to pretend not to know as judges what we know as men," and found that "the only reasonable inference . . . was the Board Members' objections to her racial activity." 364 F.2d at 182.

¹² Indeed, Circuit Judge Bell's strange concurring opinion is virtually a confession of error on the part of the majority. After conceding that the only reasons advanced by respondents for closing the pools were safety and economy, *and knowing full well that they cannot constitutionally justify such closings*, Judge Bell, in effect, suggested to this Court that "it may be that on full hearing a factual base could be developed for the constitutional principles announced by the dissenting opinion" (A. 56). However, we believe that a summary reversal is in order, and not a remand for a factual hearing. Petitioners have presented far more than a *prima facie* case, and the failure of proof must be charged to the respondents, since they had every opportunity to attempt a rebuttal, but instead presented only self-serving *and legally insufficient* affidavits. See Part C, *infra*.

(1964); *Adickes v. S. H. Kress and Co.*, — U.S. —, 90 S. Ct. 1598 (1970).¹³

In *McLaughlin v. State of Florida*, 379 U.S. 184 (1964), Mr. Justice White emphasized the standard that must be applied to the facts of this case. As he said:

But we deal here with a classification based upon the race of the participants, which must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications "constitutionally suspect," *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S. Ct. 693, 694, 98 L. Ed. 884; and subject to the "most rigid scrutiny," *Korematsu v. United States*, 323 U.S. 214, 216, 65 S. Ct. 193, 194, 89 L. Ed. 194; and "in most circumstances irrelevant" to any constitutionally acceptable legislative purpose, *Kiyoshi Hirabayashi v. United States*, 320 U.S. 81, 100, 65 S. Ct. 1375, 1385, 87 L. Ed. 1774. Thus it is that racial classifications have been held invalid in a variety of contexts. See, e.g., *Tancil v. Woolls* (Virginia Board of Elections v. Hamm), 379 U.S. 19, 85 S. Ct. 157 (designation of race in voting and property records); *Anderson v. Martin*, 375 U.S. 399, 84 S. Ct. 454, 11 L. Ed.2d 430 (designation of race on nomination papers and ballots); *Watson v. City of Memphis*, 373 U.S. 526, 83 S. Ct. 1314, 10 L. Ed.2d 529 (segregation in public parks and playgrounds); *Brown v.*

¹³ "Few principles are more firmly stitched into our constitutional fabric than the proposition that a state must not discriminate against a person because of his race . . . or in any way act to compel or encourage racial segregation," *Adickes* at 1605.

Board of Education, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (segregation in public schools).

(379 U.S. at 191-2)

Given the conceded "racial motivation" of respondents, their actions are "constitutionally suspect" and subject to the "most rigid scrutiny" and "in most circumstances irrelevant" to any constitutionally acceptable legislative purpose."¹⁴

Respondents, guilty of generations of racial discrimination, have the clear burden of justifying, on non-racial grounds, their official acts which adversely affect black persons. See *Eolfe v. County Board of Education of Lincoln County*, 391 F.2d 77, 80 (6th Cir. 1968); *Chambers v. Hendersonville City Board of Education*, 364 F.2d 189, 192 (4th Cir. 1966); *Alabama State Teachers Ass'n v. Lowndes County Board of Education*, 289 F. Supp. 300, 305 (M.D. Ala. 1968).¹⁵ This they have patently failed to do, their affidavits consisting of nothing more than self-serving assertions.¹⁶

As Mr. Justice Brennan said in his dissenting opinion in *Evans v. Abney*, — U.S. —, 90 S. Ct. 628 (1970), with respect to the park in Macon, Georgia,

¹⁴ Cf. Mr. Justice Stewart's observation that "I cannot conceive of a valid legislative purpose under our Constitution for a state law which makes the color of a person's skin the test of whether his conduct is a criminal offense" (379 U.S. at 198).

¹⁵ See also *Eubanks v. Louisiana*, 356 U.S. 584 (1958); *Reece v. Georgia*, 350 U.S. 85 (1955); *Avery v. Georgia*, 345 U.S. 559 (1953); and *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969).

¹⁶ The worthless quality of such affidavits, particularly where racial discrimination is an issue, can be seen in *Dawkins v. Green*, 412 F.2d 644 (5th Cir. 1969).

No record could present a clearer case of the closing of a public facility for the sole reason that the public authority which owns and maintains it cannot keep it segregated.

90 S. Ct. at 637. The same is true here; we maintain that it is not so that "the reasons or motives for [the closing of the swimming pools] are arguably unclear," *id.*, but, as we argue in Point I C, *infra*, even if it were unclear, the respondents' justifications are legally insufficient.

To give even an arguable validity to respondents' two reasons for closing the pools is to make the Queen of Heart's decisional processes seem entirely reasonable. If the City's decision had been based on a period of prior operation, with documented evidence of unfeasibility, one might at least give it some attention.¹⁷ But where, as here, it was based *solely and exclusively* on official speculation about what *might* happen if the pools were put on an integrated footing, it cannot possibly justify the violation of constitutionally protected rights. If the reasons advanced by respondents to justify their actions are sanctified by this Court, then it is highly likely that no integrated municipal swimming pool facilities will ever exist in the deep South.

¹⁷ "We do not say that a city may never abandon a previously rendered municipal service. *If the facts show* that the city has acted in good faith for economic or other nonracial reasons, the action would have no overtones of racial degradation and would therefore not offend the Constitution." Dissenting opinion below (A. 73, n. 16) (emphasis added).

B. The Closing of the Municipal Swimming Pools to Avoid Integration Is a Violation of the Equal Protection Clause of the Fourteenth Amendment.

Evans v. Newton, 382 U.S. 296 (1966) and *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964) are thoroughly dispositive of the issue before this Court, for they both hold, simply and directly, that state officials may not close public facilities to avoid integration.

In the ringing opinion of Mr. Justice Douglas in *Evans*, the attempt to change the character of a park in Macon, Georgia, from public to private for the purpose of excluding Negroes from enjoying its benefits was to "implicate the State in conduct proscribed by the Fourteenth Amendment." 382 U.S. at 302. An attempt to withdraw a previously public park in order to prevent its integrated use is hardly distinguishable from the closing of public swimming pools to obtain the same result. Here the City's involvement with the pools is a continuing one, for, at a minimum, it is expending tax monies to maintain them.

As Mr. Justice Douglas pointed out, "mass recreation through the use of public parks is plainly in the public domain. *Watson v. City of Memphis*, 373 U.S. 526, 83 S. Ct. 1314, 10 L. Ed.2d 529 . . ." *Id.* In considering the effect of any action concerning such facilities, courts must engage in "sifting the facts and weighing the circumstances" on a case-to-case basis . . . " *Reitman v. Mulkey*, 387 U.S. 369, 378 (1967). Such cases "exemplify the necessity for a court to assess the potential impact of official action in determining whether the State has significantly involved itself with invidious discriminations." (*Id.* at 380).

It is true that only last term this Court reconsidered the status of the park in Macon, Georgia, and permitted it to return to private hands. *Evans v. Abney*, — U.S. —, 90 S. Ct. 628 (1970). But the decision in that case wholly supports the position here advanced by petitioners. There, Mr. Justice Black, writing for a majority of this Court, stated that the closing of a public park "solely to avoid the effect of a prior court order directing the park to be integrated . . . would be clearly distinguishable from the case at bar because *there it is the State* and not a private party *which is injecting the racially discriminatory motivation*" (90 S. Ct. at 633) (emphasis added). This case is precisely the hypothetical posed by the Court in *Abney*, for here we have undisguised state action.

In *Abney*, this Court found no violation of constitutionally protected rights. In affirming the decision of the Georgia Supreme Court that Senator Bacon's trust had failed, this Court specifically emphasized the fact that "any harshness that may have resulted from the state court's decision can be attributed solely to its intention to effectuate as nearly as possible the explicit terms of Senator Bacon's will." *Id.* But here the obvious "harshness" is attributable squarely to the city's intention to effectuate as nearly as possible its "steel-hard . . . policy of segregation." *United States v. City of Jackson*, 318 F.2d at 5.¹⁸

¹⁸ As Mr. Justice Black indicated, "the Georgia court had no alternative under its relevant trust laws, which are *long standing and neutral with regard to race*, but to end the Baconsfield trust and return the property to the Senator's heirs." 90 S. Ct. at 633 (emphasis added). The City of Jackson's "long standing" actions which are non-neutral "with regard to race" are too well-known to require detailed documentations here. Cf. *NAACP v. Thompson*, 357 F.2d 831 (5th Cir. 1966); *Strother v. Thompson*, 372 F.2d 654 (5th Cir. 1967); and *Guyot v. Pierce*, 372 F.2d 658 (5th

As the Court stated in *Abney*, "the Baconsfield trust 'failed' under [Georgia] law not because of any belief on the part of any living person that whites and Negroes might not enjoy being together, but rather because Senator Bacon who died many years ago intended that the park remain forever for the exclusive use of white people." 90 S. Ct. at 634. In Jackson, Mississippi, it is not the intent of a man long dead that is controlling but rather that of "living persons" who are determined to deny to petitioners and the members of their class their fundamental constitutional rights. The tragic result in *Abney* as "part of the price we pay for permitting deceased persons to exercise a continuing control over assets owned by them at death," 90 S. Ct. at 635, need not be repeated here where no such considerations exist.

Mr. Justice Black's language in *Griffin* likewise went straight to the heart of the issue.

"But the record in the present case could not be clearer that Prince Edward's public schools were closed and private schools operated in their place . . . For one reason, and one reason only: to ensure, through measures taken by the county and the State, that white and colored children in Prince Edward County would not, under any circumstance, go to the same school."

377 U.S. at 231. Mr. Justice Black continued:

Cir. 1967). In this connection, see also the mosaic of racially motivated statutes enacted by Mississippi after 1956, contained in footnotes 4-9 of Mr. Justice Brennan's concurring and dissenting opinion in *Adickes*, 90 S. Ct. at 1623-25. Mr. Justice Douglas' catalog is equally impressive, *id.* at 1643-44.

Whatever non-racial grounds might support a state's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional.

Id. No one, knowing anything about Mississippi and its official hard core racism, can possibly doubt that the object of closing the pools is not "a constitutional one," or that this action was based on "grounds of race and opposition to desegregation." As Mayor Thompson candidly put it, in discussing the swimming pools, "... we are not going to have any intermingling" (A. 15).

C. The Justification That the City of Jackson May Close Its Municipal Swimming Facilities "When They Cannot Be Operated Economically or Safely on an Integrated Basis" Is Constitutionally Invalid.

Even if the totally unproved conjecture of the City officials—that integrated swimming pools in Jackson would be dangerous and uneconomical—were true, that is still not an excuse to close rather than integrate public facilities.

As early as 1917, and consistently thereafter, this Court has reiterated that black American citizens cannot be denied the equality and freedom unconditionally guaranteed to them by the Civil War Amendments because their enjoyment of the status might threaten the public peace.²⁰ Mr.

²⁰Cf. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *United States v. Reading Co.*, 226 U.S. 324 (1912); and *Western Union Telegraph Co. v. Foster*, 247 U.S. 105 (1918).

²¹Significantly, one of the justifications advanced in *Plessey v. Ferguson*, 163 U.S. 537 (1896), to establish "separate but equal" as a national concept was "the preservation of the public peace

Justice Day's words on this subject are as applicable today as they were when the Court, in *Buchanan v. Warley*, 245 U.S. 60 (1917), held that "an ordinance to prevent conflict and ill-feeling between the white and colored races in the City of Louisville" which restricted Negroes to the purchase or leasing of real property to blocks which were inhabited by a majority of black people, violated the Fourteenth Amendment. "It is urged," he wrote, "that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the federal Constitution." 245 U.S. at 81.²¹

In *Cooper v. Aaron*, 358 U.S. 1 (1958), the Court, while in total sympathy with the problems of the Little Rock, Arkansas, Independent School District, refused to permit "the constitutional rights of [Negro school children] . . . to be sacrificed or yielded to the violence and disorder which

and good order," *id.* at 550. The first Mr. Justice Harlan had quite the opposite view of what it is that disturbs the peace:

What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments which, in fact, proceed on the grounds that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens?

Id. at 560. Whose view was historically correct? See, *Report of the National Advisory Commission on Civil Disorders* (Kerner Commission).

²¹ The *Buchanan* Court also disposed of contentions that constitutional rights may be curtailed by the vagaries of economics. "It is said that such acquisitions by colored persons depreciate property owned in the neighborhood by white persons. But property may be acquired by undesirable white neighbors or put to disagreeable though lawful uses with like results." 245 U.S. at 82.

have followed upon the action of the Governor and Legislature . . . Thus law and order are not here to be preserved by depriving the Negro children of their constitutional rights." *Id.* at 16.²²

The Court's unanimous opinion was in response to a petition by the School Board and the Superintendent of Schools to postpone their desegregation program "because of extreme public hostility . . . engendered largely by the official attitudes and actions of the Governor and the Legislature. . . ." *Id.* at 12. The district court granted the petition after finding that there were "repeated incidents of more or less serious violence directed against the Negro students and their property . . ." *Id.* at 13; *see also* 163 F. Supp. 13 (E.D. Ark. 1958). This Court affirmed a reversal by the Eighth Circuit of the district court's decision, even though it accepted the latter's findings of fact.

In the instant litigation, there is absent the past history of violence and disorder so dramatically present in *Cooper*. The courts below simply accepted at face value the claims of the Mayor and other public officials of the City that the operation of these pools on an integrated basis would endanger "the personal safety of the citizens of the City . . ." Even assuming, *arguendo*, this to be the case, the fault lies wholly with the State of Mississippi and the City of Jackson, and the tragic history of their wholehearted encouragement of illegal resistance to any efforts

²² The anguished objections of officials of the City of Jackson, that black and white American citizens who insisted on exercising their constitutional prerogative of riding buses together into that municipality in the spring and summer of 1961 would provoke others to breaches of the peace, were summarily rejected by this Court in *Thomas v. Mississippi*, 380 U.S. 524 (1965).

at integration.²³ As the *Cooper* Court put it, "the record before us clearly establishes that the growth of the Board's difficulties to a magnitude beyond the unaided power to control is the product of state action. Those difficulties . . . can also be brought under control by state action." 358 U.S. at 16.²⁴ The City of Jackson must meet its self-created problems by other means than depriving its black residents of their most fundamental rights.²⁵

The argument that it is "unsafe" to integrate public facilities received its most recent rejection in *Washington v. Lee*, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd per curiam*,

²³ In addition to the cases and statutes previously cited, see *Meredith v. Fair*, 305 F.2d 343 (5th Cir. 1962); *United States v. Barnett*, 376 U.S. 681, 683-86 (1964); *Bailey v. Patterson*, 323 F.2d 201 (5th Cir. 1963).

²⁴ See Mr. Justice Brennan's opinion in *Adickes v. S. H. Kress Co.*, *supra*, where he stated:

The protection of constitutional rights may not be watered down because some members of the public actively oppose the exercise of constitutional rights by others. *Cooper v. Aaron*, 358 U.S. 1 (1958). To give any weight at all to that argument would be to encourage popular opposition to compliance with the Constitution. Moreover, the argument is particularly devoid of merit in the context of §1983, which was enacted by a Congress determined to stamp out widespread violations of constitutional rights at virtually any cost, and which imposed liability even on persons who simply failed to prevent certain violations.

90 S. Ct. at 1642-43.

²⁵ As Circuit Judge Wisdom so aptly pointed out in his dissenting opinion, "the City of Jackson's operation of other public recreational facilities on a desegregated basis indicates that the city's law enforcement officers are able to preserve peace and that the pools were closed not to promote peace, but to prevent blacks and whites swimming in the same water" (A. 59). At the same time, he observed that public swimming pools in both New Orleans and Tallahassee, which originally closed rather than operate on an integrated basis, have now been reopened on an integrated basis without significant incident. *Id.*

390 U.S. 333 (1968). A three-judge court held laws requiring segregation in Alabama jails to be unconstitutional, and that the practice could not be justified by appeals to security and public order. The court established a one year maximum deadline for the total integration of the prisons—even in maximum security jails. This Court affirmed, *per curiam* and without comment.

Petitioners' position is supported, perhaps best of all, by *Watson v. City of Memphis*, 373 U.S. 526 (1963), for that case simultaneously demolishes appeals to both safety and economy. In that case, the City was arguing for a delay in the implementation of integration in its public parks. The Court first differentiated between schools and other facilities, stating that desegregation of schools was a more delicate and difficult task, and that the "all deliberate speed" concept should not be applied in other areas of the law, 373 U.S. at 530-32.

What the Court then said about a *six month delay* in park integration must apply *a fortiori* to the total and permanent abandonment of integration, as here:

The claims of the city to further delay in affording the petitioners that to which they are clearly and unquestionably entitled cannot be upheld except upon the most convincing and impressive demonstration by the city that such delay is manifestly compelled by constitutionally cognizable circumstances warranting the exercise of an appropriate equitable discretion by a court. *In short, the city must sustain an extremely heavy burden of proof.*

Id. at 533 (emphasis added). When the City there raised the same old spectre of public unrest as an excuse, this Court replied:

The compelling answer to this contention is that constitutional rights may not be denied simply because of hostility to their assertion or exercise.

Id. at 535. And the Court continued, in words again wholly applicable to this case:

Beyond this, however, neither the asserted fears of violence and tumult nor the asserted inability to preserve the peace was demonstrated at trial to be anything more than personal speculations or vague disquietudes of city officials. There is no indication that there had been any violence or meaningful disturbances when other recreational facilities had been desegregated.

Id. at 536.

Finally, Mr. Justice Goldberg, writing for a unanimous Court, came to the City's assertion that integration would be more costly, presumably because more supervision would be needed:

There is no warrant in this record for assuming that such added supervision would, in fact, be required, much less that police and recreational personnel would be unavailable to meet such needs if they should arise. More significantly, however, it is obvious that *vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them.*

Id. at 537 (emphasis added).

In the present case, the City of Jackson has not even advanced a theory as to why integration would be more costly—there is merely a bald assertion to that effect. *Watson* makes it abundantly clear, however, that such an assertion—even if true—is not a constitutionally sufficient excuse.²⁶

The City of Jackson was ordered to integrate its swimming pools more than seven years ago. It must now do so—whether or not there will be real or imagined problems in carrying out that order.

D. The Fact That the Closing of the Municipal Swimming Pools Denied the Use of Their Facilities to All Residents of the City of Jackson Cannot Justify the Abridgement of Petitioners' Constitutional Rights.

The majority below, in accepting and “blessing” the two excuses offered by the City for closing its swimming and wading pools, also gave credence to the district court’s conclusion that “where a public facility is closed to members of all races, any issue as to discrimination becomes moot” (A. 30). In Circuit Judge Rives’ words:

²⁶ The majority below admitted this principle, correctly citing *Cooper v. Aaron* (A. 48). But only a few pages later (A. 54), Judge Rives concluded that petitioners were *not* denied equal protection because the asserted threat to safety and economy—created by integrating the pools—*did* establish a constitutional justification for the closings. This kind of circular reasoning and boot-strapping leaves one lost in a semantic bog of specious distinctions between “mere racial motivation,” and “racially discriminatory purpose” (A. 56). Indeed “[p]roof of an evil motive or of a specific intent to deprive a person of a constitutional right is generally not required under Section 1983.” Mr. Justice Brennan’s concurring-dissenting opinion, in *Adickes*, 90 S. Ct. at 1642.

As to swimming pools, which a city may furnish or not at its discretion, it seems to us that a city meets the test of the equal protection clause when it decides not to offer that type of recreational facility to any of its citizens on the ground that to do so would result in an unsafe and uneconomical operation (A. 49).

The fallacy of this reasoning rests in the fact that both courts blandly assume that the closing of public facilities has the same effect on both the black and white citizens involved. But, as this Court so dramatically pointed out in *Griffin, supra*, the effect of the closing of the public school system in Prince Edward County was infinitely more disastrous to the black children than it was to their white counterparts. In Mr. Justice Black's words:

Closing Prince Edward's schools bears more heavily on Negro children in Prince Edward County since white children there have accredited private schools which they can attend, while colored children until very recently have had no available private schools, and even the school they now attend is a temporary expedient (377 U.S. at 230).

But one hardly had to wait for *Griffin* to ascertain this Court's stand. The answer is to be found in *Brown v. Board of Education* itself:

To separate [black children] from others of similar age and qualifications solely because of their race generates a *feeling of inferiority* as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

347 U.S. at 494 (emphasis added). While it is true that, prior to *Brown*, white children were segregated by law in the same states of the Union that segregated black children, there was never a contention that the majority group was deprived of equal educational opportunities thereby. If "separate educational facilities are inherently unequal," 347 U.S. at 495, insofar as children of the *minority* group are concerned, then the closing of pools by the majority group to prevent integration is similarly "inherently unequal."

Any other analysis would signify a return to the days of *Plessy v. Ferguson*, *supra*. It would be intolerable if we were to resuscitate at this late date Mr. Justice Brown's cavalier observation in *Plessy* that

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act but solely because the colored race chooses to put that construction on it (163 U.S. at 551).

As Circuit Judge Wisdom points out, this court has consistently struck down statutes which, while equally applicable on their face to both black and white citizens, are based upon racial considerations (A. 62-66). See e.g. *Loving v. Virginia*, 388 U.S. 1 (1967); *Anderson v. Martin*, 375 U.S. 399 (1963) and *Griffin v. County School Board of Prince Edward County*, *supra*. The point is that, in the United States, laws which refer to race can never be neutral, but always reflect in some degree the history of slavery, and the black man's traditional position of inferiority.

This Court understands full well the psychological factors that are at work. The holding in *Brown* rested squarely on such a basis.²⁷ Now this Court must again choose between the psychological theory of *Plessey* and the psychological theory of *Brown*; there is no third route.

E. The Action of Respondents Openly Encourages and Fosters Private Discrimination.

By closing its public swimming and wading pools, the City of Jackson has ensured that private swimming facilities will be developed to take their place. That the private pools will be for whites only, there can, of course, be no doubt. Indeed, the City showed the way by returning the Leavell Woods pool to private hands, knowing full well that it would be operated by the white-only YMCA on a white-only basis.²⁸ The City was instructing those of its white residents who wanted to swim how to get back into the segregated waters. It would be hard to imagine a more clear example of people "harness[ing] the energies of private groups to do indirectly what they cannot . . . allow their government to do," *Reitman v. Mulkey*, 387 U.S. 369, 383 (Douglas, J., concurring) (1967).

This Court has never established a single infallible test for determining when a State has become involved in private discrimination to an unconstitutional degree. Rather, the lines have been sketched on a case-by-case basis. Wherever the line is ultimately drawn, however, it is clear

²⁷ See the psychological studies cited in footnote 11 of *Brown v. Board of Education*, 347 U.S. at 494.

²⁸ As previously indicated, this is fast becoming a south-wide pattern. See Brief of Amicus Curiae, and the Albany, Georgia, experience, described in fn. 35, p. 40, *infra*.

that, in this case, respondents have gone far beyond what is constitutionally permissible. As Mr. Justice Harlan said for the Court recently in *Adickes v. S. H. Kress & Co.*, — U.S. —, 90 S. Ct. 1598, 1605 (1970):

Few principles of law are more firmly stitched into our constitutional fabric than the proposition that a State must not discriminate against a person because of his race or the race of his companions, or in any way act to *compel or encourage* racial segregation. (Emphasis added.)

This Court undertook a systematic review of the cases dealing with state-encouraged private discrimination in *Reitman v. Mulkey*, *supra*. Mr. Justice White's careful discussion began with *McCabe v. Atchison, Topeka & Santa Fe R. Co.*, 235 U.S. 151 (1914), characterizing it as a case which forbid mere "authorization to discriminate," 387 U.S. at 379. Justice White's characterization of the action taken in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), was even more forceful and directly relevant to the instant case:

Although the State neither commanded nor expressly authorized or encouraged the discriminations, the State had "elected to place its power, property and prestige behind the admitted discrimination" and by "its inaction . . . has . . . made itself a party to the refusal of service . . ." which therefore could not be considered the purely private choice of the restaurant operator.

387 U.S. at 380. Here the city officials have publicly committed themselves to opposing "intermingling" in the pools,

and have directly made available City property—the Leavell Woods pool—for private and segregated use.²⁹

The *Mulkey* Court considered finally a trio of sit-in cases, *Peterson v. City of Greenville*, 373 U.S. 244 (1963); *Robinson v. State of Florida*, 378 U.S. 153 (1964); and *Lombard v. State of Louisiana*, 373 U.S. 267 (1963). Read together, these cases held that otherwise neutral trespass laws were tainted by the presence of a State policy encouraging segregation, even when a private person who had not actually been influenced by the state regulations, sought to invoke them. Mr. Justice Brennan canvassed those same three decisions in his concurring and dissenting opinion in *Adickes*. What he said about restaurant owners is equally applicable to private persons and corporations who operate, or will operate, white-only swimming and wading pools in Jackson:

Thus, when private action *conforms with state policy*, it becomes a manifestation of that policy and is thereby drawn within the ambit of state action. In sum, if an individual discriminates on the basis of race and does so in conformity with the State's policy to authorize or encourage such discrimination, neither the State nor the private party will be heard to say that their mutual involvement is outside the prohibitions of the Fourteenth Amendment.

90 S. Ct. at 1626 (emphasis added).

²⁹ In this regard, the Fifth Circuit majority's cavalier statement in a footnote that the City is not implicated in the operation of the Leavell Woods pool (A. 37), is simply incredible. "There is no such thing as the state's being just a little bit discriminatory." *Poindexter v. Louisiana Financial Assistance Commission*, 275 F. Supp. 833, 835 (E.D. La. 1967).

The *Mulkey* Court approved the three-pronged analysis which the California Supreme Court had used in examining that State's constitutional amendment on the subject of open housing laws. 387 U.S. at 1630. A similar examination of the "immediate objective," the "ultimate effect," and the "historical context and the conditions existing prior to its enactment" would be instructive here as well.

1. The "immediate objective" of closing the pools in Jackson was to avoid the integration directed by *Clark v. Thompson, supra*. It is clear from the affidavits of respondents, and from all of the opinions below, that that desegregation order was both the occasion for, and the motive behind, the closings.

2. The "ultimate effect" has been to deny to black citizens of Jackson the use of public swimming facilities, where before there had at least been one. In human terms, this has meant the lives of the two black children who had drowned in the Pearl River by the time this lawsuit was filed, A. 6, and others who have no doubt met a similar fate during the years that followed.

3. The "historical context" is, of course, the "steel-hard, inflexible, undeviating official policy of segregation," *United States v. City of Jackson*, 318 F.2d 1, 5 (5th Cir. 1963).

This three-part analysis only accentuates what is obvious—that the "private" discrimination by the YMCA and others is really attributable to the City itself.

Jackson has not, of course, passed any ordinances forbidding integrated swimming. Nor has it attempted the slightly more sophisticated technique of giving direct pub-

lic aid to private segregated ventures. But there should be no doubt that the City has directly encouraged and fostered the growth of such facilities. Not only has the City withdrawn from the field—thus creating opportune market conditions for private enterprise; not only has the City turned one leased pool directly over for segregated use by the YMCA, but City officials have also, by their public statements and actions, strengthened and nurtured Mississippi's traditional policies and customs with respect to the separation of the races. Any doubt that such customs are themselves part of the state's "law," and thus an element of "state action," was removed by Mr. Justice Harlan's recent opinion for the Court in *Adickes*:

This interpretation of custom recognizes that settled practices of state officials may, by imposing sanctions or withholding benefits, transform private predilections into compulsory rules of behavior no less than legislative pronouncements. If authority be needed for this truism, it can be found in *Nashville, C. & St. L. Rwy. v. Browning*, 310 U.S. 362 (1940), where the Court held that although a statutory provision suggested a different note, the "law" in Tennessee as established by long-standing practice of state offices was that railroads and public utilities were taxed at full cash value. What Justice Frankfurter wrote there seems equally apt here:

"It would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice . . . can establish what is state law. The Equal Protection Clause did not write an empty formalism into the Constitution. Deeply embedded

traditional ways of carrying out state policy, such as those of which petitioner complains, are often tougher and truer law than the dead words of the written text." *Nashville, C. & St. L. Rwy. v. Brown- ing, id.*, at 369.

And in circumstances more closely analogous to the case at hand, the statements of the chief of police and mayor of New Orleans, as interpreted by the Court in *Lombard v. Louisiana*, 373 U.S. 267 (1963), could well have been taken by restaurant proprietors as articulating a custom having the force of law. Cf. *Garner v. Louisiana*, 368 U.S. 157, 176-185 (1961); *Wright v. Georgia*, 373 U.S. 284 (1963); *Baldwin v. Morgan*, 287 F.2d 750, 754 (5th Cir. 1961).

90 S. Ct. at 1614.

The key to this case is to cut through the semantic jungle, and to see what the City of Jackson has in fact accomplished. Characteristically, Judge Wisdom has done so:

The City's action tends to separate the races, encourage private discrimination, and raise substantial obstacles for Negroes asserting the rights of national citizenship created by the Wartime Amendments. . . . We should not be misled by focusing on the City's non-operation of the pools. Closing the pools as an official act to prevent Negroes from enjoying equal status with whites constituted the unlawful state action: it had the same purpose and many of the same effects as maintaining separate pools (A. 72).

II.

The action of respondents denies to petitioners and the members of their class effective judicial remedies and in effect, punishes them for resorting to the legal process.

At the end of his dissenting opinion below, Circuit Judge Wisdom sadly surveyed the wreckage around him:

The closing of the City's pools has done more than deprive a few thousand Negroes of the pleasures of swimming. It has taught Jackson's Negroes a lesson: In Jackson the price of protest is high. Negroes there now know that they risk losing even segregated public facilities if they dare to protest segregation. Negroes will now think twice before protesting segregated public libraries, or other segregated facilities. They must first decide whether they wish to risk living without the facility altogether, and at the same time engendering further animosity from a white community which has lost its public facilities also through the Negroes' attempts to desegregate these facilities.

(A. 71-72). In short, Jackson's Negroes have been punished by the City for having the "audacity" to sue for their rights in federal court. But punishment of this kind is forbidden by the decisions of this Court, and by a battery of federal statutes.³⁰

³⁰ This Court has more than once undertaken an exhaustive study of the whole panoply of federal remedies enacted by the Reconstruction Congress. Outstanding examples are *Monroe v. Pape*, 365 U.S. 167 (1961); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); and *Adickes v. S. H. Kress & Co.*, — U.S. —, 90 S. Ct. 1598 (1970).

On many occasions, this Court has reminded us of the evils inherent in any governmental actions that tend to chill the exercise of constitutional rights. *Dombrowski v. Pfister*, 380 U.S. 479 (1965). This is particularly true where political litigation is concerned. In *NAACP v. Button*, 371 U.S. 415 (1963), the Court pointed out that "under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances." 371 U.S. at 429-30.

The Civil Rights Act of 1866, 14 Stat. 27, guarantees to all citizens the same right to use the legal system of this nation "as is enjoyed by white citizens." 42 U.S.C. §1981.²¹ Petitioners, acting as "private attorneys general," *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968), sought redress in the courts to end segregation in the public facilities of their city. It was in response to this federally protected action that the City of Jackson imposed its sanction—closing the swimming and wading facilities altogether. It is axiomatic that the City may not thus punish black citizens for doing what a federal statute—42 U.S.C. §1981—gives them a right to do.²²

²¹ "This law is clearly corrective in its character, intended to counteract and furnish redress against state laws and proceedings and customs having the force of law, which sanction the wrongful acts specified." *Civil Rights Cases*, 109 U.S. 3, 16 (1883).

²² This Court dealt with a similar situation, this time involving the Civil Rights Act of 1964 in *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964). There, the Court "emphasized the precise terms of §203(c) that prohibit any attempt to punish persons for exercising rights of equality conferred upon them by the Act." *State of Georgia v. Rachel*, 384 U.S. 780, 804 (1966). The "attempt to punish" condemned in *Hamm* (and, indirectly, in *Rachel*) was not only the ultimate possibility of a conviction, but also the harassing tactic of the prosecution itself. Thus, the fact that the government employed sanctions against persons for the legitimate exercise of rights guaranteed under a federal statute is sufficient to invalidate those sanctions without more.

When the Reconstruction Congress enacted this legislation, it extended to black people the protective mantle of a federal statute which protected any of them who sought the aid of the judicial system. "That Congress," the first Justice Harlan noted,

"undertook to remove certain burdens and disabilities, the necessary incidents of slavery, and to secure, to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely the same right to make and enforce contracts, to sue, be parties, give evidence and to inherit, purchase, lease, sell and convey property as is enjoyed by white citizens . . ."²²

Civil Rights Cases, 109 U.S. at 35 (dissenting opinion). The City of Jackson cannot be permitted to destroy or nullify any of "those fundamental rights."

The City's action in closing the swimming and wading pools in response to a federal court order integrating them is further violative of Section 1981 in that it may affect future decisions of black people to seek legal redress. Before undertaking to desegregate parks, pools or whatever, such prospective plaintiffs must decide whether the risk created by a successful law suit—the total closing of the facility—is worth the benefit of their right to sue. Perhaps, as Circuit Judge Wisdom pointed out, "Negroes will

²² This Court has, only recently, provided a remedy for one who was punished by being expelled from a Virginia nonstock corporation operating a community park and playground facility for assigning his lease to a black man. *Sullivan v. Little Hunting Park, Inc.*, — U.S. —, 90 S. Ct. 400 (1969). "If that sanction, backed by a state court judgment, can be imposed, then Sullivan is punished for trying to vindicate the rights of minorities protected by §1982. Such a sanction would give impetus to the perpetuation of racial restriction on property." 90 S. Ct. at 404.

now think twice before protesting segregated public parks, segregated public libraries, or other segregated facilities" (A. 72).

Both Congress and the courts have recognized that it is imperative that a party not be punished for bringing a complaint before a court or administrative agency. For example, Congress has made it an unfair labor practice for an employer to discharge or discriminate against, or for a union to restrain or coerce, an employee, because he has brought a complaint to the National Labor Relations Board, Sec. 8(a)(4) and 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. 158(a)(4) and (b)(1)(A). It is an unlawful employment practice for an employer to discriminate against an employee who has brought charges under Title VII of the Civil Rights Act of 1964, 42 U.S.C. (2000 P. 3(a)). Under Title II of the same act, it is illegal to punish or attempt to punish any person for exercising or attempting to exercise any rights secured under that title, 29 U.S.C. 200a-2(c).³⁴

Respondents' closing of the pools, if held constitutional, would put black people in the position of having to make the best of two bad choices. They could (1) accept segre-

³⁴ In forbidding such sanctions, Congress was acutely aware that the persons whom such legislation was intended to benefit are often in a position where those against whom their complaint is brought have the power to penalize them. Thus, Congress has wisely enacted a policy of protecting those who use their legal remedies.

This Court, well understanding the utter importance of unimpeded access to judicial and quasi-judicial bodies, has recently unanimously found that not only is an employer or a union forbidden to take coercive action against an employee who complains to the N.L.R.B., such activity is also forbidden to the states. *Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967). See also *Crandell v. Nevada*, 73 U.S. 35 (1868) and *In re Querles and Butler*, 158 U.S. 532 (1895).

gated public facilities which are obviously unconstitutional or (2) institute litigation to integrate such facilities, knowing that if they are successful, public officials might close both the black and the white facilities. The result of demanding enforcement of their constitutional right may result, as it has for the black people of Jackson, Mississippi,³⁵ with their having less use of public facilities. Before suit was brought to integrate Jackson's swimming pools, black people could use at least one public pool. In direct response to that suit, all of the pools have been closed. This is indeed too high a price to pay for acting to enforce one's constitutional rights.

This Court has been conscious that forcing a complainant to make such hard choices constitutes an unreasonable burden. In *N.L.R.B. v. Industrial Union of Marine and Shipbuilding Workers of America*, 391 U.S. 418 (1968), it agreed with the N.L.R.B. that under the National Labor Relations Act, a union member could not be expelled from his union for bringing a charge against his union without exhausting intra-union grievance procedures. In explaining that such a rule forced the member to guess whether a specific procedure would be held reasonable, this Court stated at 425, "That risk alone is likely to chill the exercise of a member's right to a Board remedy and induce him to forego his grievance or pursue a futile union proce-

³⁵ As well as Montgomery, Alabama (A. 73) and Canton, Edwards, West Point and Greenwood, Mississippi, among others, see Brief of Amicus Curiae. In Albany, Georgia, Tift Park Swimming Pool was closed to avoid integration, and then sold at one-fourth of its value to the Herald Publishing Co. which promptly gave the pool to the Boys' Club. It is now operated on a white-only basis. *Gaines, et al. v. The City of Albany, Georgia, et al.*, Civil Action No. 987 (M.D. Ga. 1968).

dure."³⁶ (Emphasis added.) See also *Ryan v. International Brotherhood of Electrical Workers*, 361 F.2d 942 (7th Cir. 1966), cert. den. 385 U.S. 936 (1966). *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998 (5th Cir. 1969).

This Court has likewise found, of course, that state activity may have the purpose and effect of chilling an individual's use of his constitutional rights. Such activity is forbidden. *Dombrowski v. Pfister*, 380 U.S. 479 (1965). Access to the courts is certainly chilled when the plaintiff finds himself in a worse position by winning a suit than by not acting at all. Sec. 1981 gives black people the same right to sue as white people in every court in the nation, but the City of Jackson has attempted to burden that right.³⁷

The right to bring suit in federal court is an essential right, being the usual and, often, only way of redressing constitutional grievances. Such essential rights are pro-

³⁶ "A proceeding by the Board is not to adjudicate private rights but to effectuate a public policy." 391 U.S. at 424.

³⁷ This Court certainly needs no reminder of the role private litigants have played in the implementation of a policy of racial equality in recent years. See, e.g., *Brown v. Board of Education*, *supra*, and *Clark v. Thompson*, *supra*, the case that led to the closing of Jackson's bathing pools. In fact, implementation of the rights guaranteed by the Amendments primarily is dependent upon the initiative of individual persons who must invoke the jurisdiction of the federal courts to stop unconstitutional discrimination. *N. A. A. C. P. v. Button*; *Newman v. Piggie Park Enterprises*, both *supra*.

Congress, realizing the importance of private suits in ending discrimination in public facilities, has expressly stated in Title III of the Civil Rights Act of 1964, 42 U.S.C. 2000 b-2, that nothing in the Act adversely affects the right of any person to obtain relief in court for such unconstitutional activity. See also *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968), cert. denied, 393 U.S. 1016 (1969), in which eviction in retaliation for filing a Housing Code complaint was forbidden.

tected from all forms of intimidation as well as from violence. *United States v. Board of Education of Green County*, 332 F.2d 40 (5th Cir. 1964), *United States v. Beaty*, 288 F.2d 653 (6th Cir. 1961). The right of petitioners to institute federal corrective litigation is near to meaningless if victories are worse than merely Pyrrhic. The City of Jackson, through its public officials, is hindering the attempt of black people to integrate its public facilities. The message to black people will be clear and unambiguous if this Court allows the decision below to stand. In Circuit Judge Wisdom's words, "[T]hey must first decide whether they wish to risk living without the facility altogether, and at the same time engendering further animosity from a white community which has lost its public facilities also through the Negroes' attempts to desegregate these facilities" (A. 72).

This Court should not force black people to make such a choice.

III.

The action of respondents in closing the pools of the City of Jackson violates the Thirteenth Amendment.

We live in a nation striving to rejoin the human race.³³ More than a century after the Civil War, we are still deeply involved in the business of putting an end to our greatest shame—the institution of human chattel slavery. Progress has been painfully slow; the end is not yet in sight. Now, we are at a crossroads, for precisely at a time when new promises are being made to the ex-slaves to speed up the pace of change, there are other forces at work seeking to slow down and, indeed, totally reverse the trend.

The City of Jackson has presented a challenge to this nation and to this Court. Stripped of ingenious appeals to "equal application," and disingenuous appeals to safety and economy, the City has put before this Court the following proposition: "Blacks are inferior; they are former slaves—beasts of burden; they are barely human, 'beings of an inferior order,'"³⁴ and we simply will not tolerate them sully the waters of our swimming pools."

This Court must now decide whether to accept or reject that proposition and that challenge. For this Court to affirm the decision below would be to revive *Dred Scott*, and to bury the Thirteenth Amendment.

Actually, this Court has only recently accomplished the historic task of rediscovering and enunciating the power

³³ *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 449 n. 6 (Douglas, J., concurring) (1968).

³⁴ *Scott v. Sandford*, 60 U.S. (19 How.) 393, 404 (1857).

and thrust of the Thirteenth Amendment. In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), the Court held that Congress had the power under that Amendment to pass virtually any law that had as its aim the eradication of even a vestige of the former slave system. In the ringing words of Mr. Justice Stewart, writing for the Court: "Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation." *Id.* at 440. The Court found that it was not irrational for the Reconstruction Congress to have determined that discrimination in the sale of real property was a relic of slavery.⁴⁰

In *Jones*, the Court specifically left open the question whether the Thirteenth Amendment *itself* did more than to abolish slavery and establish universal freedom. Put another way, the open question is whether this Court must await a congressional determination of what are "badges and indicia of slavery," or whether it, too, can identify and then eliminate every "relic of slavery."

There is little doubt as to how the Court will, and must, answer this question, when faced with a case without any

⁴⁰ The Court actually went considerably further than that, for it indicated that not only was it *rational* for Congress so to determine, but the proposition was *in fact true*. Mr. Justice Stewart wrote:

Just as the Black Codes, enacted after the Civil War to restrict the free exercise of those rights were substituted for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.

Id. at 441-42.

congressional pronouncements—such as the present one. The answer is really contained in the *Civil Rights Cases*, 109 U.S. 3 (1883)—not only in the famous dissent of the first Mr. Justice Harlan, but in the majority opinion of Mr. Justice Bradley as well. The latter wrote:

This amendment, as well as the Fourteenth, is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force and effect it abolished slavery, and established universal freedom. . . . [I]t has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States . . .

Id. at 20.

The Bradley opinion conceded that the amendment authorized Congress to go beyond the existence of *actual* enslavement, in order to reach all of its badges and incidents. Obviously, the amendment could only authorize Congress to go that far if the amendment itself was not narrowly confined to actual slavery.

Mr. Justice Stewart recognized this in footnote 78 of the *Jones* opinion, 392 U.S. at 441, overruling *Hodges v. U.S.*, 303 U.S. 1 (1906). *Hodges* had held that the Thirteenth Amendment, and therefore congressional action pursuant to it, reached only cases of actual enslavement. Mr. Justice Stewart responded that this narrow reading was "irreconcilable with the position taken by every member of this Court in the *Civil Rights Cases* and incompatible with the history and purpose of the Amendment itself." (Emphasis added.)

When this Court sees a vestige of the slave system existing in our Nation, it thus has the constitutional duty to root it out and destroy it utterly, no matter in what form it may appear. The question facing this Court is thus simply stated: Is the refusal to allow black people to swim in Jackson's pools "a badge and indicia of slavery" or "a relic of slavery"?

The answer is so self-evident that it seems almost superfluous and redundant to discuss it. If discrimination in the wholly private sale of a house was characterized as "a relic of slavery" by the *Jones* Court, how could resistance to integration in a public swimming pool be held to be otherwise? If the Thirteenth Amendment means that a black man has "the freedom to buy whatever a white man can buy, the right to live wherever a white man can live," 392 U.S. at 443, how can it not mean that a black man can swim wherever a white man can swim?

This kind of simple and forthright analysis utterly demolishes the lower court's degrading theory that what Jackson has done is not so bad, since only a "non-essential" facility is involved. The Thirteenth Amendment does not differentiate between discrimination in areas of more or less "importance." White people do not have the right to "grant" equality in schooling, in voting, and in housing, but withhold it in a swimming or wading pool. The Thirteenth Amendment *guarantees* the end of inferiority in *every* area of our national life.

The Thirteenth Amendment has this sweep for an important reason—it overruled *Dred Scott*. The national law of slavery announced in that decision is the shame and despair of this Nation and this Court, but its historical analysis of

slavery was very accurate indeed. Chief Justice Taney pointed out that the entire system of slavery rested on a single proposition—the innate inferiority of the black man. This was the heart and soul of slavery, its axiom, its article of faith, its guiding principle. Blacks were, in the eyes of the dominant white majority, not even “people,” but “beings of an inferior order,” 60 U.S. at 404. When the Thirteenth Amendment eradicated *Dred Scott*, therefore, it did far more than simply to end the legal relationship of slave to master. What it did was to rewrite our national ideology, to declare that black people are truly human beings, fully equal in *every* respect to white men, and, indeed, to all men. Henceforth, the ex-slave was to have *the same rights* as a white man in every aspect of national life. See Kinoy, *The Constitutional Right of Negro Freedom*, 21 Rutgers L. Rev. 387 (1967); *The Constitutional Right of Negro Freedom Revisited*, 22 Rutgers L. Rev. 537 (1968); *Jones v. Alfred H. Mayer Co.: An Historic Step Forward*, 22 Vand. L. Rev. 475 (1969); and *The Present Crisis in Legal Education*, 24 Rutgers L. Rev. 1 (1970).^{40a}

^{40a} See also the recent Edward Douglass White Lectures on Citizenship by Prof. Charles L. Black, Jr., in March 1968, at Louisiana State University in which Prof. Black stated:

“I have to say that herein I am walking over recent footsteps—those of Professor Arthur Kinoy, whose article [*The Constitutional Right of Negro Freedom, supra*], published last fall, stated the case in considerable analytic and historical depth for our revitalizing the elder Justice Harlan’s views in dissent in the *Civil Rights Cases* of 1883, and finding in the command that the Negro shall be a citizen a command not merely that he rejoice in that honorific label, but also that he be allowed, both by the State and by those who actually control the matter, to participate fully in the public life of the society of which he is a citizen. I shall not try to improve either on Justice Harlan or on Professor Kinoy, but will add a few peripheral observations.” (Footnotes omitted.)

Black, *Structure and Relationship in Constitutional Law*. Baton Rouge: Louisiana State University Press (1969) pp. 53-54.

In his concurring opinion in *Jones*, Mr. Justice Douglas reviewed many of the cases that this Court has decided under the Equal Protection clause in the last fifteen years, and showed that they can be more fully understood, and their impact better appreciated, by reference to the Thirteenth Amendment. All of those cases—from schools to public accommodations, to housing, to voting—reflect the resistance of the old slave South to change, “a spectacle of slavery unwilling to die.” 392 U.S. at 445-49. Each new disguise, each strategy for delay, is a throwback to slavery and its single rule that blacks are inferior, and not fit to associate with white people, particularly in close quarters.”

This Court must look at the present case in the same way. Petitioners are entitled to a reversal here because of the simple fact that the City of Jackson has said that blacks are unfit to swim in the public pools. “Blacks are so inferior,” the City is saying, “that their mere presence in our waters will create riots and economic chaos.” Stated another way, the slave cannot be allowed to dirty the pools of the master race.

In *Chandler v. Judicial Council*, — U.S. —, 90 S. Ct. 1648 (1970), Mr. Justice Black eloquently discussed the promises of our constitutional system of law:

Our Constitution gave new hope and dreams for freedom and equal justice to citizens of this country and signaled to the suffering and oppressed people everywhere that government could be humane.

⁴¹ One example Justice Douglas used is strikingly applicable here: “The blacks who travel the country . . . may well learn that the ‘vacancy’ sign does not mean what it says, *especially if the motel has a swimming pool.*” *Id.* at 447 (emphasis added).

90 S. Ct. at 1683 (dissenting opinion). But words and phrases, no matter how moving or how eloquent, can no longer convince a despairing and doubt-ridden people, who live, as James Baldwin has put it, in a daily state of rage, that government is even credible, much less humane.⁴²

This Court must *now* finish the historic work that was begun in *Jones*. This Court must *itself* reaffirm that Negroes are free and equal citizens of the United States, rather than "beings of an inferior order." This Court must keep the promise of the Thirteenth Amendment. In a word, this Court must reverse the decision below, lest *Dred Scott* once again becomes the law of the land.

⁴² Recently, former Chief Justice Warren, in asking that the date of "our original sin of slavery" be "wiped clean," said as follows:

"... we find that hundreds of thousands of black children are denied equal opportunities of education; like numbers of adults are denied the privilege of voting; litigants, witnesses and jurors are deliberately humiliated in court rooms; people are denied the right to live wherever they choose; and a myriad other indignities are imposed on millions merely because of their color."

The Twenty-Seventh Annual Benjamin Cardozo Lecture delivered before the Association of the Bar of the City of New York on April 9, 1970. *The Record*, Vol. 25, No. 6, June 1970, 351, 354.

CONCLUSION

The judgment below should be reversed and the district court directed to issue a permanent injunction requiring respondents or their successors in office to operate the municipal swimming and wading facilities of the City of Jackson on an integrated basis.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 107

HAZEL PALMER, ET AL.,
Petitioners,

vs.

ALLEN C. THOMPSON, MAYOR, CITY OF
JACKSON, ET AL.,
Respondents.

BRIEF OF RESPONDENTS

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All Emphasis Ours Unless Otherwise Indicated

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 107

HAZEL PALMER, ET AL.,
Petitioners,

VS.

ALLEN C. THOMPSON, MAYOR, CITY OF
JACKSON, ET AL.,
Respondents.

BRIEF FOR RESPONDENTS

QUESTION PRESENTED

After 1963 when the integration of all recreational facilities furnished by the City of Jackson was required by the Federal Courts¹, the City immediately integrated all

1. *Clark v. Thompson*, 206 F.Supp. 539 (1962); *aff'd* 313 F.2d 637 (1963); *cert. den.* 375 U.S. 951, 11 L.ed.2d 312 (1963).

its recreational facilities. However, in the exercise of its discretion based on its best judgment it decided to no longer make available to any citizen any public swimming pools. Since that time no swimming pools have been available to either white or black citizens, all races being treated equally.

The only question here presented is: Can this Court by mandatory injunction require the City of Jackson to make available to its citizens a recreational facility such as a swimming pool, in spite of the best judgment of the City that the same could not now be safely or economically operated, i.e., do Petitioners have any *constitutional right* to demand such facilities? Respondents deny that Petitioners have any such right under either the Thirteenth or the Fourteenth Amendments to the Constitution.

STATEMENT OF THE CASE

In 1963 the City of Jackson was operating equal but separate recreational facilities such as parks and golf links, including swimming pools. A suit was brought in the Southern District of Mississippi to enjoin the segregated operation of these facilities. The City of Jackson took the position in that litigation that the segregation of recreational facilities, if separate and equal recreational facilities were provided and if citizens voluntarily used segregated facilities, was constitutional. The District Court in *Clark v. Thompson*, *supra*, held otherwise. While refusing to grant injunctive relief it entered a declaratory judgment requiring the allowance of use of these recreational facilities by all races. Petitioners appealed to the Fifth Circuit Court of Appeals. The judgment of the District Court was affirmed on March 6, 1963, reported 313 F.2d 637. A petition for Rehearing was denied on April 23, 1963. Certiorari

was not denied until *December 16, 1963* (375 U.S. 951, 11 Led.2d 312).

Thereafter the City immediately integrated all recreational facilities, i.e., its parks, golf links, zoo, auditorium, etc. No such facilities were closed. The binding effect of the decision in *Clark* has never been questioned by the City.

However, at that time the City Council made an administrative decision, by legislative enactment of its City Council, that it would close all swimming pools and not furnish this particular type of recreational facility to any citizen. While its decision followed, and in that limited sense resulted from, the *Clark* decision it was not motivated by a desire to discriminate on account of race². The intent and purpose of the City in so doing was specifically found by the court below in this litigation, i.e.: "The personal safety of the citizens of the City and the maintenance of law and order would be endangered by the operation of public swimming pools on an integrated basis. These pools could not be economically operated in that manner." (A. 28). *Such reasons would not justify discrimination.* They would not have been a defense in *Clark*, *supra*. However, they justify an administrative decision of policy of the City applicable equally to all citizens and where there was no denial of fundamental privileges of citizens.

After the swimming pools had been closed to all citizens for two years the present litigation was brought seeking mandatory injunctive relief to require the City to reopen and maintain swimming pools for its citizens on the alleged ground that the plaintiffs were being denied their rights under the Fourteenth Amendment³.

2. There is a vast difference between a decision based on "racial considerations" and a purposeful racial discrimination.

3. Any rights under the Thirteenth Amendment were an afterthought.

Factually, Petitioners' case is predicated on one statement in an opinion in 1963 from the Fifth Circuit to the effect that the State of Mississippi and the City of Jackson had in the past had an undeviating official policy of segregation⁴. Petitioners allege that "This is the single most important fact in the present case, and provides a backdrop for the offense which led to the institution of this litigation" (P. Brief p. 4).

Based on this statement from this opinion Petitioners here seek to deny Respondents due process of law. Petitioners state that the burden of proof is upon Respondents to disprove that the closing of the pools had a discriminatory purpose. No case is cited to that effect⁵.

The official policy of segregation of Mississippi since *Brown* has been no more than the exercise of its constitutional rights to litigate to protect what it believed were its constitutional rights. As pointed out by Petitioners the Mississippi statute now in force is § 4065.3 which merely requires members of the executive branch of the government ". . . to prohibit, by any lawful, peaceful and constitutional means the implementation of or the compliance with the Integration Decision of the United States Supreme Court . . . and to prohibit by any lawful, peaceful and constitutional means, the causing of mixing or integration of the white and negro races . . . in public schools . . . public places of amusement . . .".

4. Quoted from *U. S. v. City of Jackson*, C.A. 5, 318 F.2d 15, decided in 1963. The case involved removal from restrooms in terminals of signs indicating segregation thereof. After the decision the signs were removed and all of the statutes referring thereto have been repealed. All public facilities of the City of Jackson are now integrated. Conditions in Mississippi have changed since 1963.

5. *Watson v. Memphis*, 373 U.S. 526, 10 L.ed.2d 529 (1963) does not so hold. The issue was proof by the City to delay segregation, admittedly required.

The controlling rule as to the burden of proof is stated in *Snowden v. Hughes*, 321 U.S. 1, 88 L.ed. 497 (1943). There a candidate for a state office brought an action against the members of the State Primary Canvassing Board to recover damages for alleged infringement of his civil rights in violation of the Fourteenth Amendment. The complaint alleged that the Board failed to issue a certificate of nomination to him after he received a sufficient number of votes at a primary election to entitle him thereto and that the defendants "wilfully, maliciously and arbitrarily" failed and refused to file with the Secretary of State a correct certificate reflecting that he was a nominee and that defendants conspired and confederated together for that purpose and that their action constituted "an unequal, unjust and oppressive" administration of the state election laws thereby depriving plaintiff of his rights under the Fourteenth Amendment.

This Court in affirming a dismissal of the complaint for failure to state a cause of action stated:

"... There is no allegation of any facts tending to show that in refusing to certify petitioner as a nominee, the Board was making any intentional or purposeful discrimination between persons or classes."

"The unlawful administration by state officers of a state statute fair on its face, *resulting* in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is *shown* to be present in it *an element of intentional or purposeful discrimination*. . . . a discriminatory purpose is not presumed, *Tarrance v. Florida*, 188 US 519, 520, 47 L ed 572, 573, 23 S Ct 402, there must be a showing of 'clear and intentional discrimination' . . .

"The lack of any allegations in the complaint here, tending to show a purposeful discrimination between persons or classes of persons is not supplied by the opprobrious epithets 'wilful' and 'malicious' applied to

the Board's failure to certify petitioner as a successful candidate. . . . These epithets disclose nothing as to purpose or consequence of the failure to certify . . ."⁶

Not only have Petitioners failed to offer any proof that the act of the City in closing the swimming pools was one of "intentional or purposeful discrimination" but the undisputed proof of the City is to the contrary.

There was involved here *an administrative decision of a municipality as to a discretionary function*. The undisputed proof is that this administrative decision of the City was based on consideration of the maintenance of law and order and to avoid economic loss.

The only proof by Petitioners was one affidavit by one Carolyn Stephens (A. 2). The only facts alleged in this affidavit dealt with the closing of the pools and the policy and attitude of the City prior to the conclusion of *Clark v. Thompson*, supra, on December 16, 1963. Factual allegations referred to the equal but separate segregated recreational facilities prior to that time, a list of which was made Exhibit "A" to the affidavit⁷. There is not one iota of proof by Petitioners that the decision after December 1963 of the City to permanently close the pools was one of "intentional or purposeful discrimination".

On the other hand, the proof of the City to the contrary is undisputed. The affidavit of Mayor Thompson was as follows:

6. *Snowden* has been recently cited with approval in *Shock v. Tester*, C.A. 8, 405 F.2d 852 (1969), cert. den. 394 U.S. 1020, 23 L.ed.2d 45 (1969), also pointing out "Not every grievance that an individual has against the government, even though meritorious, reaches constitutional proportions . . ."; *Wessling v. Bennett*, C.A. 8, 410 F.2d 206 (1969); *Delia v. Court of Common Pleas of Cuyahoga County*, C.A. 6, 418 F.2d 205 (1969); *Colon v. Grieco*, D.C. D. N. J., 226 F.Supp. 414 (1964).

7. The only other offer of proof was by purported quotations of the Mayor from local newspapers. These were out of context and not corroborated, i.e., were pure hearsay and were alleged statements prior to the final decision in *Clark*.

"Realizing that the personal safety of all of the citizens of the City and the maintenance of law and order would prohibit the operation of swimming pools on an integrated basis, and realizing that the said pools could not be operated economically on an integrated basis, the City made the decision subsequent to the Clark case to close all pools owned and operated by the City to members of both races. The City thereby decided not to offer that type of recreational facility to any of its citizens, and it has not done so and does not intend to reopen any of said pools.

"All other recreational facilities have been completely desegregated and have been made available to all citizens of the City regardless of race . . . and all facilities of said parks and auditoriums have been and are available to all citizens of the City regardless of race." (A. 21)

The affidavit of Mr. George T. Kurts, Recreational Director of the City, was to the following effect:

"That after the decision of the Court in the case of Clark v. Thompson, it became apparent that the swimming pools owned and operated by the City of Jackson could not be operated peacefully, safely, or economically on an integrated basis, and the City decided that the *best interest of all citizens* required the closing of all public swimming pools owned and operated by the City; that the City thereby decided not to offer that type of recreational facility to any of its citizens; that it has not done so and does not intend to reopen any of said pools.

"That all other recreational facilities which the City makes available to its citizens have been completely desegregated and have been made available to all citizens of the City regardless of race; that this includes but is not limited to the golf courses, the playground areas, swings, see-saws, rings, and other playground facilities . . ." (A. 18)

In another affidavit by Mr. Kurts (A. 16) he states: ". . . The City of Jackson would suffer a serious financial loss if it attempted to operate said pools, or any of them, on an integrated basis"⁸.

In this litigation the District Court made a specific finding of fact that the acts of the City were not ones of "intentional or purposeful discrimination". The finding of the District Court was affirmed by the Fifth Circuit (A. 34). The Court of Appeals quoted from the District Court's Finding of Fact to the effect that the closing was based on economic reasons and maintenance of law and order and stated: "There seems to be no dispute as to the facts; certainly the findings of fact are not clearly erroneous." (A. 35)

On Petition for Rehearing the Court of Appeals adopted the findings of fact of the District Court and stated:

"... In dismissing this complaint, after considering the affidavits and testimony, the district court found that the city officials acted in the interest of preventing violence and preserving economic soundness to the City's operations. Even though such motive obviously stemmed from racial considerations, we know of no prohibition to bar the city from taking such factors into account and being guided by conclusions resulting from their consideration."⁹ (A. 53)

It is true that a dissenting opinion was filed (A. 56). There was also filed a specially concurring opinion by seven judges (A. 55), where it was pointed out that the dissenting

8. These affidavits were not self-serving assertions. They were not "speculations". They factually stated the considered opinion and best judgment of the Commissioners which motivated these decisions as to the cessation of operation of a discretionary function.

9. The court recognizing the validity of the consideration of racial factors if not for an invidious or discriminatory purpose, citing from *Shuttlesworth v. Birmingham Board of Education*, 162 F.Supp. 372 (1958), *aff'd* 358 U.S. 101, 3 L.ed.2d 145 (1958).

opinion was necessarily based upon facts not proved and not found by the court below, i.e., that there was no proof whatsoever of any racially discriminatory purpose in the discretionary decision to close the pools. This opinion contains the following language:

"The final footnote¹ of the dissenting opinion shows that the differences between the majority and the dissenters are largely factual. . . . With deference, it would appear that *the dissenting opinion*, in making the finding that the City of Jackson acted in bad faith, *simply departs from the record. There is no record basis for such a finding.*

"Whether to operate swimming pools, racial discrimination aside, is a matter for the City of Jackson. We can easily surmise, indeed it may not be disputed, that the closing here was racially motivated. Mere racial motivation, however, *is not proof of a racially discriminatory purpose in the closing.* . . . We cannot assume racial discrimination simply from the fact of the closings. Constitutional principles, as important as they are, must nevertheless rest on facts." (A. 44-45)

In spite of *Snowden*, and in spite of the fact that there is not one iota of proof in this record that the City of Jackson, although taking race into consideration in making its decision, made the same with the intention of discriminating or for that purpose, Petitioners still allege as a fact that the motives of the City of Jackson arose solely from the belief that Negroes were inferior and could not be associated with. No such assumption can be made. Inferiority had nothing to do with the decision of the officials.

1. "We do not say that a city may never abandon a previously rendered municipal service. If the facts show that the city has acted in good faith for economic or other nonracial reasons, the action would have no overtones of racial degradation, and would therefore not offend the Constitution." (A. 73)

The best judgment of the City in 1963 is now fully corroborated. This Court will take judicial knowledge of the fact that there still exists a serious danger of violent clashes between young people of different racial groups, whether stemming from acts of or promoted by one group or the other. It is apparent that such clashes are more probable where there is close contact in a swimming pool and more dangerous because of the depth of the water. There was and is unquestionably probability of friction or disorder.¹⁰ There was also the probability that parents of either or both groups would restrict their children's attendance in such swimming pools because of the danger of such friction or disorder, with the result that the income from the pool would be severely limited and result in severe economic loss.

Certainly the discretional closing of the pools was the result of the *considered best judgment* of the officials, whether right or wrong, that the City could not adequately protect its citizens of either race in integrated pools and such operation would result in severe economic losses.

The City of Jackson is not by its present action perpetuating past inequalities or perpetuating past racial discrimination. All citizens are equally denied city pools. *If there is any inequality now it is economic rather than racial.* As said by the court below:

"... The equal protection clause does not promise or guarantee economic or financial equality. In applying the requirements of the equal protection clause, this Court cannot require a city to operate a public swimming pool solely because the city's ceasing to do so forecloses the enjoyment by financially

10. Nor could the financial liability of the City for failure to preserve peace in the performance of this proprietary function be ignored.

less fortunate citizens [of both races] of recreational facilities available on a completely private basis to the more affluent." (A. 53)

However, there is no proof here of even any economic inequality. There are integrated pools now available in Jackson. There are Negro citizens of Jackson who are financially able to build private swimming pools. The City of Jackson, with over 150,000 citizens, is not a rich city. In California one may find a large number of private swimming pools maintained by many private citizens. In this city as many white children as Negro children are foreclosed the enjoyment of this particular recreational facility.

SUMMARY OF THE ARGUMENT

I

Petitioners have no rights under the Thirteenth Amendment to have a city make available to them public swimming pools. This Amendment only protects the basic "Fundamental Rights" of a citizen of a State, i.e., the class of rights which the State Governments were created to establish and secure. Such rights include the right to work for whom they please, to make and enforce contracts, to sue and be sued, and to give evidence. The right to have a swimming pool made available is not such a privilege or immunity of citizenship.

II

Petitioners here have no rights under the Fourteenth Amendment of the Constitution forbidding a State to deny to any person "the equal protection of the law." All citizens of the City are equally deprived of public swimming pools. Discrimination as protected by the Fourteenth Amendment requires that there be a difference between the applicability of State law or actions to some citizens

as compared with other citizens. So long as the acts of the City apply to all alike the requirement of equal protection of the law is met.

III

Respondents have not "punished" Petitioners for litigating in *Clark* their right to integrated city recreational facilities. There is no intimation of any threats, intimidations or criminal prosecution and access to the courts has not been denied Petitioners. Petitioners have proved no retaliatory intent or motive on the part of the City in closing the swimming pools. No constitutional federal statute has been violated. Moreover there having been no deprivation of any constitutional right by the City, motive is immaterial.

ARGUMENT¹¹

POINT I

Petitioners Have Been Denied No Rights under the Thirteenth Amendment and Denied No Privileges and Immunities of Citizens of the United States under the Fourteenth Amendment. The Only Rights Protected Thereby Are the "Fundamental Rights" of Citizenship, Which Do Not Include the Right to Have a City Furnish a Public Swimming Pool.

The basic question here is: Is a municipality under any obligation to its citizens to make available public

11. A reply to Petitioners' argument is difficult: (1) Petitioners again and again pick up a single clause or sentence from an opinion, completely out of context and disconnected from the facts or the holding of the case, usually from a dissenting opinion, and attempt to build an entirely new principle of constitutional law therefrom or thereon. Specific situations control decisions, not general or loose language in the opinion. *Hughes v. Superior Court of California*, 339 U.S. 460, 94 L.ed 339 (1950); (2) Petitioners again and again state an alleged principle of law and follow it with a bare citation by name of various cases. The cases do not support the principle announced. Distinguishing all of them would be impractical; (3) There is a continuing appeal for a decision based on sympathy, passion or prejudice.

swimming pools, where none are furnished for any citizens, and is such an obligation enforceable under the Constitution of the United States?

The rights granted by the Thirteenth Amendment are more limited than those granted by the Fourteenth Amendment. The Thirteenth Amendment only protects against inequality of treatment or discrimination. Moreover, the rights under the Thirteenth Amendment are strictly limited to the "fundamental rights" of citizenship, such as the right to own and use property, the right to make and enforce contracts, or the right to sue and give evidence, i.e., the privileges and immunities of citizenship. These "fundamental rights" of citizenship do not include the right to have a municipality make available to its citizens a specific recreational facility.

The Thirteenth Amendment literally merely abolished the "institution" of slavery. Congress, by virtue of § 2 thereof giving it authority to enforce the article by appropriate legislation, has enlarged the rights thereunder to include a guaranty of the "fundamental rights" of citizenship. It has gone no further.

Amicus Curiae argue from the debates in Congress in 1864 and 1865, prior to the submission of the Amendment to the States for adoption, that the Amendment granted unlimited rights of any kind and character.¹² The flowery language of these early debates was typical of the political oratory of the day and arose from the emotions of the late war and the proclamation of Lincoln. They are not illuminating.

In "The 'New' Thirteenth Amendment: A Preliminary Analysis", 82 *Harvard Law Review*, 1294 (1969) there appears the following language:

12. It will be noted that Petitioners in their brief do not adopt this argument.

"The framers' debates were directed more to the desirability of emancipation than to the meaning of the language. They were conducted on a level of hyperbole befitting the fervor which had attached itself to the issue after thirty years of agitation. . . . The oratory, however, is ambiguous. . . . The rights which most of the framers anticipated that the free-men would enjoy were probably only of the theoretical sort already granted in the North. When congressmen described the 'incidents of slavery' they tended to refer, for example, to the breach of 'the conjugal relationship,' the destruction of the slaves' capacity to 'acquire and hold [property],' and the denial of the 'right to testify' in court."¹³

The Thirteenth Amendment was adopted by the states in December 1865. The next year there was introduced in Congress the Civil Rights Act of 1866. Therein it was provided that all citizens of the United States "of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime where the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States to *make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens . . .*" (Ch. 31, Sess. 1, 39th Congress).

The proposed Act created an enormous amount of opposition on the ground that it was not justified under the Thirteenth Amendment. The debate thereon was lengthy and evidenced a wide difference of opinion among the members of Congress as to whether or not the Thirteenth Amendment permitted the enactment of the law protect-

13. On the irrelevancy and inconclusiveness of such source see *Brown v. Board of Education*, 347 U.S. 483, 98 L.ed. 873 at p. 878 (1954).

ing these limited "fundamental rights". President Andrew Johnson vetoed the Bill, feeling that it was unconstitutional. In 1866 Congress was debating overriding the veto of the President. Even the proponents thereof recognized and admitted that the rights protected by the Thirteenth Amendment were limited to the basic and fundamental rights of a citizen of any government.¹⁴

Even after the passage of the 1866 Civil Rights Act many of those who voted for the Act expressed serious doubt as to its constitutionality. This led to the adoption of the Fourteenth Amendment only a few months later, which included the provision:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.¹⁵ No State shall make or enforce any law

14. See, for example, the language of Mr. Lawrence of Ohio in speaking in favor of overriding the veto: "It [The Civil Rights Act] does not affect any political right, as that of suffrage, the right to sit on juries, hold office, &c. This it leaves to the States, to be determined by each for itself. It does not confer any civil right, but so far as there is any power in the States to limit, enlarge, or declare civil rights, all these are left to the States." "But it does provide that as to certain enumerated civil rights every citizen 'shall have the same right in every State and Territory.' That is whatever of certain civil rights may be enjoyed by any shall be shared by all citizens in each State, and in the Territories, and these are: 1. To make and enforce contracts. 2. To sue, to be sued, and to be parties. 3. To give evidence. 4. To inherit, purchase, lease, sell, hold, and convey real and personal property. 5. To be entitled to full and equal benefit of all laws and proceedings for the security of person and property." *Congressional Globe*, April 7, 1866, p. 1832.

15. It was this provision of the Fourteenth Amendment, and not any provision of the Thirteenth Amendment, which overruled the *Dred Scott* decision (60 U.S. 393, 15 L.ed. 691, 1857) which merely held that a Negro was not a citizen under the Constitution and therefore not entitled to the rights of a citizen. We submit that Petitioners are appealing only to prejudice in stating that the affirmance of this case would "revive" *Dred Scott* or that unless this case is reversed *Dred Scott* would once again become the law of the land. Respondents, of course, know that Negroes are citizens and entitled to all of the rights of citizens. The question here is merely whether a citizen has a right to demand of a municipality that it make available a public swimming pool.

which shall abridge the privileges or immunities of citizens of the United States . . ."

The adoption of the Fourteenth Amendment, followed by the re-enactment of the 1866 Civil Rights Act as the Civil Rights Act of 1870, were in a large part designed to put the doubts at rest as to the constitutionality of the Civil Rights Act of 1866 under the Thirteenth Amendment. H. Flack, *The Adoption of the Fourteenth Amendment*, pp. 94-95.

The limited rights granted by the Thirteenth Amendment, i.e., limited to "fundamental rights of citizenship", was made clear. *The Civil Rights Cases*, 100 U.S. 3, 27 Led. 835 (1883). In that case there was involved an 1875 Act of Congress prohibiting any discrimination in any accommodations of inns, public conveyances, theaters and other places of public amusement on account of race or color. The Act was held unconstitutional and not saved by the Thirteenth Amendment.¹⁶ The Court assumed that the Thirteenth Amendment went beyond merely destroying the institution of slavery but included the right to vindicate "*those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery.*" However, the Court held that the right to equal use of such accommodations was not such a fundamental right which was of the essence of citizenship or a right protected by the Thirteenth Amendment. This Court in holding the Statute unconstitutional used the following language:

"Conceding the major proposition to be true, that Congress has a right to enact all necessary and proper

16. It was not unconstitutional under the Fourteenth Amendment which only prohibited State actions. The Fourteenth Amendment was thus not involved. Later acts of Congress along such lines are justified only under the Commerce Clause of the Constitution.

laws for the obliteration and prevention of slavery with all its badges and incidents, is the minor proposition also true, that the denial to any person of admission to the accommodations and privileges of an inn, a public conveyance or a theater, does subject that person to any form of servitude, or tend to fasten upon him any badge of slavery? If it does not, then power to pass the law is not found in the 13th Amendment. . . . But is there any similarity between such servitudes and a denial by the owner of an inn, a public conveyance, or a theater, of its accommodations and privileges to an individual, even though the denial be founded on the race or color of that individual? Where does any slavery or servitude, or badge of either, arise from such an act of denial? . . . The long existence of African slavery in this country gave us very distinct notions of what it was, and what were its necessary incidents. Compulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, to make contracts, to have a standing in court, to be witness against a white person, and such like burdens and incapacities were the inseparable incidents of the institution. Severer punishments for crimes were imposed on the slave than on free persons guilty of the same offenses. Congress, as we have seen, by the Civil Rights Bill of 1866, passed in view of the 13th Amendment, before the 14th was adopted, undertook to wipe out these burdens and disabilities, the necessary incidents of slavery, constituting its substance and visible form; and to secure to all citizens of every race and color, and without regard to previous servitude, *those fundamental rights which are the essence of civil freedom, namely: the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoined by white citizens.* Whether this legislation was fully authorized by the 13th Amendment alone, without the support which it afterwards received from the 14th Amend-

ment, after the adoption of which it was re-enacted with some additions, it is not necessary to inquire. It is referred to for the purpose of showing that at that time, in 1866, Congress did *not* assume, under the authority given by the 13th Amendment, to adjust what may be called the social rights of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery. . . ."

This case has never been overruled.

In *Slaughter-House Cases*, 16 Wall. 36, 21 L.ed. 394 decided in 1872 it was held that the provision of the Fourteenth Amendment that no State should make or enforce any law which shall abridge *the privileges or immunities of citizens of the United States* was limited.¹⁷ The Court held that the privilege of conducting a business was a privilege of a citizen of a State, not of the United States, and not protected by the Constitution, either under the Thirteenth or Fourteenth Amendment. In that case there was under attack a statute of Louisiana chartering the Slaughter-House Company and granting to it the exclusive privilege to establish and maintain stockyards and slaughterhouses in the City of New Orleans. Certain butchers in New Orleans who desired to slaughter their own cattle at their own place of business attacked the statute as unconstitutional on the ground that it created an involuntary servitude forbidden by the Thirteenth Amendment

17. Such as the privilege of presenting any claim one might have against the Government; the privilege of demanding the care and protection of the Federal Government when on the high seas or within the jurisdiction of a foreign government; the privilege of peaceable assembly and petition for redress of grievances; the privilege of writ of habeas corpus; the privilege of using navigable waters of the United States; and the privilege of becoming a citizen of any State in the Union by bona fide residence therein.

and abridged the privileges and immunities of citizens of the United States forbidden by the Fourteenth Amendment. The Court after holding that it did not abridge the privileges and immunities of citizens of the United States then held that it did not abridge the privileges of citizens of the State in that no person had an absolute right to conduct any business he wanted but was subject to such restraints as the State might prescribe for the general good of the whole. The Court in discussing what were the privileges and immunities of a citizen of a State used the following language:

“‘The inquiry,’ he says, ‘is, what are the privileges and immunities of citizens of the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are fundamental; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate.’ ‘They may all, however, be comprehended under the following general heads: protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole.’ . . . And they have always been held to be the class of rights which the state governments were created to establish and secure.”

It cannot be said that the right to have a city provide a public swimming pool is a fundamental privilege which belongs to the citizens of all free governments and a right which the state government was created to establish and secure.

Equally limited is *Jones v. Alfred Mayer Co.*, 392 U.S. 409, 20 L.ed.2d 1189 (1968) so heavily relied on by Petitioners. There the plaintiff sought injunctive relief against a private company for refusing to sell him a home in a subdivision solely because he was a Negro. Relief was sought under a Federal Statute, 42 U.S.C. § 1982, part of the original 1866 Civil Rights Act, providing that all citizens had the same right as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property.¹⁸ The constitutionality of the statute was attacked.

The only issue in the case was whether or not, unlike the Fourteenth Amendment, the Thirteenth Amendment protected rights as against private persons and whether § 1982 was broad enough to include deprivation of "fundamental rights" by private persons. The Court interpreted the statute as prohibiting deprivation of a fundamental right (i.e., the ownership of property) by individuals. This was the only actual holding of the Court.

The Court discussed the constitutionality of the statute under the Thirteenth Amendment, basing such constitutionality only on *the fact that the right to buy and sell property was one of the fundamental rights of a citizen*. The Court not only held that it was within the civil rights protected by the Thirteenth Amendment but that there was actual discrimination on account of race and then particularly pointed out that Congress had enacted a statute dealing therewith under the authority of the sec-

18. Petitioners sue here under 42 U.S.C. 1981, also from the 1866 Civil Rights Act, limiting rights to the making of and enforcing of contracts, to sue, be parties, give evidence, and to full benefit of all laws, the security of persons and property. The right to availability of a public swimming pool does not come within any of these rights. Petitioners also claim under § 1983 which itself grants no rights or privileges but merely a remedy. *Monroe v. Pape*, 365 U.S. 167, 5 L.ed.2d 492 (1961).

ond section of the Thirteenth Amendment, specifically providing: "Congress shall have power to enforce this article by appropriate legislation." The Court pointed out from the Congressional Record that it was the intent of Congress in passing the Thirteenth Amendment, and particularly section 2 thereof, to authorize legislation which would preserve to every citizen the "great fundamental rights" of a citizen. The opinion quotes remarks of Senator Trumbull in early December 1865¹⁹:

"... 'And, sir, when the constitutional amendment shall have been adopted, if the information from the South be that the men whose liberties are secured by it are deprived of the privilege to go and come when they please, *to buy and sell when they please*, to make contracts and enforce contracts, I give notice that, if no one else does, I shall introduce a bill and urge its passage through Congress that will secure to these men every one of these rights: they would not be freemen without them. *It is idle to say that a man is free who cannot go and come at pleasure, who cannot buy and sell, who cannot enforce his rights* ...' (emphasis by the court)

"Five days later, on December 18, 1865, the Secretary of State officially certified the ratification of the Thirteenth Amendment. . . . On January 5, 1866, Senator Trumbull introduced the bill he had in mind—the bill which later became the Civil Rights Act of 1866. He described its objectives in terms that belie any attempt to read it narrowly: . . . Senator Trumbull's bill . . . would affirmatively secure for all men, whatever their race or color, what the Senator called the 'great fundamental rights': the right to acquire property, the right to go and come at pleasure, the right to enforce rights in the courts, to make contracts, and to inherit and dispose of property.' As to those basic civil rights, the Senator said, the bill would

19. Cong. Globe, 39th Cong. 1st Sess. 43.

'break down all discrimination between black men and white men.'

"It thus appears that, when the House passed the Civil Rights Act on March 13, 1866, it did so on the same assumption that had prevailed in the Senate: It too believed that it was approving a comprehensive statute forbidding all *racial discrimination affecting the basic civil rights enumerated in the Act*. . . . In light of the concerns that led Congress to adopt it and the contents of the debates that preceded its passage, it is clear that the Act was designed to do just what its terms suggest: *to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein—including the right to purchase or lease property.*"

Thus the right protected in *Jones* was one of the "fundamental rights" of any citizen (Not a mere desire to have a public swimming pool available).

The emphasis placed by the Court upon the fact that Congress had acted and passed the statute under § 2 of the Amendment is shown by the following quotation from the opinion:

"By its own unaided force and effect, the Thirteenth Amendment 'abolished slavery, and established universal freedom.' Civil Rights Cases, 109 US 3, 20, 27 L ed 835, 842, 3 S Ct 18. Whether or not the Amendment itself did any more than that—a question not involved in this case²⁰—it is at least clear that the enabling clause of that Amendment empowered Congress to do much more. . . . Senator Trumbull of Illinois, the Chairman of the Judiciary Committee, had brought the Thirteenth Amendment to the floor of the

20. Here, under Petitioners' argument the Amendment itself would have to grant the right sought in that there has been no legislative action. The right sought is beyond the "fundamental rights". Congress must grant it if it can constitutionally. 82 *Harvard Law Review* at p. 1319.

Senate in 1864. In defending the constitutionality of the 1866 Act, he argued . . . 'Who is to decide what that appropriate legislation is to be? The Congress of the United States; and it is for Congress to adopt such appropriate legislation as it may think proper, so that it be a means to accomplish the end.' . . . this Court recognized long ago that, whatever else they may have encompassed, the badges and incidents of slavery—its 'burdens and disabilities'—included restraints upon 'those fundamental rights which are the essence of civil freedom, namely, the same right . . . to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens.' *Civil Rights Cases*, 109 US 3, 22, 27 L Ed 835, 843, 3 S Ct 18."

"Negro citizens, North and South, who saw in the Thirteenth Amendment a promise of freedom—freedom to 'go and come at pleasure' and to 'buy and sell when they please'—would be left with 'a mere paper guarantee' if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man. At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live."

There was thus involved in *Jones* both discrimination solely on account of race and a federal statute granting property rights and a right which was one of the "fundamental rights" of a citizen.

Petitioners argue that this Court should now "finish the historic work that was begun in *Jones*".²¹ As stated, the only historic portion of *Jones* was the application of

21. Petitioners apparently urge that the Courts go further and hold that under the Thirteenth Amendment individuals could not deny others any social or economic equality. The implications are staggering. Courts should not be put under pressure to "assume the duties of parenthood". 82 *Harvard Law Review* 1294.

§ 1982 and the Thirteenth Amendment to acts of private citizens. It merely protected rights by individuals against deprivation of "fundamental rights".

POINT II

Petitioners Have Not Been Denied the Equal Protection of the Law under the Fourteenth Amendment.

The provision of the Fourteenth Amendment relied on merely states: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The administrative decision of the City Council to close all swimming pools applied equally to all citizens and has been and is being enforced equally as to all citizens. Discrimination as protected by the Fourteenth Amendment requires that there be a "difference", or a "distinction" between the applicability of State laws or actions to some citizens as against its applicability to others. "So long as the law applies to all alike, the requirements of equal protection are met". *Louisiana v. Resweber*, 329 U.S. 459, 91 L.ed. 422 (1947).

Before there is a denial of equal protection of the laws under the Fourteenth Amendment there must be (1) a difference in treatment of different citizens, and (2) a difference motivated by an intent and purpose to discriminate on account of race, i.e., an invidious discrimination.²² Before the second requirement comes into play there must be a "difference" or inequality, not present here. Motive is therefore irrelevant.

The question of the right of a municipality or a state to completely close some recreational facility has been fre-

22. The prohibition of the equal protection clause goes no further than invidious distinction. *Snowden*, *supra*. See *Ferguson v. Skrupa*, 372 U.S. 726, 10 L.ed.2d 93 (1963); *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80, 90 L.ed. 1096 (1946).

quently submitted to lower courts. In each and every instance the courts have pointed out that where all citizens are treated equally no question arises under the Fourteenth Amendment and that the determinative issue is that citizens had no constitutional right whatsoever to such facilities²³ The court below in affirming the District Court held that the closing of all pools to all citizens did not deny Negroes the equal protection of the law and then stated:

"The operation of swimming pools is not an essential public function in the same sense as the conduct of elections, the governing of a company town, the operation or provision for the operation of a public utility, or the operation and financing of public schools." (A. 48).

". . . As to swimming pools, which a city may furnish or not at its discretion, it seems to us that a city meets the test of the equal protection clause when it decides not to offer that type of recreational facility to any of its citizens on the ground that to do so would result in an unsafe and uneconomical operation.

"There is, of course, no constitutional right to have access to a public swimming pool." (A. 49).

The holding in this case of the Fifth Circuit is in accord with its previous holding in *City of Montgomery v. Gilmore*, C.A. 5, 277 F.2d 364 (1960) where the issue was the right of the City to close its parks. There that Court held:

"We agree with the district court that no law, State or Federal, requires the City to operate public parks. . . . In its resolution closing the parks, the Board of Commissioners . . . stated that, 'the members of the Commission are of the opinion that it is to the best

23. For this reason the basic thrust of Petitioners' argument is necessarily under the Thirteenth Amendment which, as pointed out under Point I hereof, cannot be justified.

interests of the citizens of Montgomery that said parks be closed.' That is a matter committed to the wisdom of the members of the Board of Commissioners, and is not subject to review by this Court in the absence of some violation of the Constitution of the United States."

Also, see the opinion of the Fifth Circuit in *Hampton v. City of Jacksonville*, C.A. 5, 304 F.2d 319 (1962).

In *Tonkins v. City of Greensboro*, D.C. N.C., 162 F.Supp. 549 (1958), 175 F.Supp. 476 (1959), aff'd C.A. 4, 276 F.2d 890 (1960), there was involved the issue as to whether or not the City had the right to close pools rather than operate them on an integrated basis. The Courts answer this question in the affirmative on the ground that no person had a constitutional right to swim in a public pool. The Court stated:

"With respect to the right of the plaintiffs, and other Negroes similarly situated, to use the Lindley Park Swimming Pool on the same terms and conditions applicable to white citizens, this would appear to be a moot question. The City of Greensboro, through its City Council, is firmly committed to a permanent closing and sale of the pool. . . . The question here presented is whether the defendants have the right to close or sell the Lindley Park Swimming Pool rather than to operate it on an integrated basis. The plaintiffs contend that the answer to this question depends upon whether there is a duty imposed upon the defendants to support the Fourteenth Amendment to the Constitution of the United States. There is no question but that the defendants do have a positive duty to support the Fourteenth Amendment and other provisions of the Constitution of the United States, as these provisions are interpreted by our Courts, *but the question still remains as to whether or not the Constitution of the United States imposes upon a municipality the positive duty to own and operate recreational facilities.* . . . In the final analysis, the plaintiffs can only com-

plain of discrimination or unequal treatment. If the swimming pools are closed to all, or disposed of through a bona fide public sale, there can be no unequal treatment and, therefore, no racial discrimination. No citizen of Greensboro will have access to municipal swimming facilities. *Unless persons under the same circumstances and conditions are treated differently there can be no discrimination. No person has any constitutional right to swim in a public pool.* All citizens do have the right, however, if a swimming pool is provided, not to be barred therefrom solely because of race or color. If the swimming pools are closed or sold, the rights of all groups will be equal, and it must follow that the closing or sale will not discriminate against anyone. . . .

"No one contends that this Court has the power to require the State of South Carolina to operate any park. This Court cannot by mandamus order the reopening of the closed park. In Simkins v. City of Greensboro, D.C. M.D. N.C. 1957, 149 F.Supp. 562, it was held that a municipality was not required to furnish a golf course for its citizens but if it undertakes to do so out of public treasury, it cannot constitutionally furnish such facilities to a part of its citizens and deny them to others similarly situated." (Quotation is from 162 F.Supp. 549)

To the same effect see *Wood v. Vaughan*, D.C. Va., 209 F.Supp. 106 (1962), *aff'd* C.A. 4, 321 F.2d 474 (1963), and *Walker v. Shaw*, D.C. S.C., 209 F.Supp. 569 (1962).

In *Legarde v. Recreation & Park Commission*, D.C. La., 229 F.Supp. 379 (1964), the Court held:

"There is no legal obligation or duty on the part of the City or Parish to provide or operate any public recreational facilities. . . ."

In *Willie v. Harris County, Tex.*, 202 F.Supp. 549 (1962), the Court pointed out that there was no constitu-

tional compulsion which directed a state or its subdivisions to furnish recreational facilities.

With all public swimming pools in the City of Jackson now closed, and closed since 1963, there is no question of any discrimination on account of race and therefore no question arises under the Fourteenth Amendment to the Constitution.

Petitioners can cite no case to the contrary. Instead several arguments are made without factual support or legal basis.

i.e. Petitioners argue: "A", The sole reason for closing the municipal swimming pools was to prevent integration.

The proof and findings of the court below were to the contrary. True, the administrative decision to close all pools followed, and to that extent resulted from, the judicial requirement that pools and all recreational functions must be integrated. Petitioners fail to note the difference between a decision involving racial considerations and an action based on an intent and desire to discriminate.

As stated by the court below:

"True, the City decided to close the pools rather than to operate them on an integrated basis. There was, however, no evidence that it reached that decision in an effort to impede further efforts to integrate. (A. 47) . . . The pools were closed because they could not be operated safely or economically on an integrated basis. Is that a denial of equal protection of the laws? . . . In our opinion that simply is not true." (A. 48)

No statement could be more erroneous than Petitioners' statement that actions that are the result of "racial

motivation are *per se* discriminatory". The cases cited²⁴ do not support any such statement. What these decisions hold with reference to motivation is that *where there is actual discrimination* that other motives would not prevent them from being unconstitutional, i.e., *discrimination cannot be justified on the ground of other motives*.

Motives do not create discrimination when there is no actual discrimination and no actual denial of any constitutional rights. Motives do not create a new constitutional right.

The motives of Congress or of a State Legislature or of a City Council are not subject to judicial scrutiny so long as the enactment is within the authority of the legislative branch and denies no constitutional rights.

"It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. . . . This fundamental principle of constitutional adjudication was reaffirmed and the many cases were collected by Mr. Justice Brandeis for the Court in *Arizona v. California*, 283 U.S. 423, 455, 75 L.Ed. 1154, 1165 . . ." *United States v. O'Brien*, 391 U.S. 367, 20 L.ed.2d 672 (1968).

Cases to the same effect include: *Daniel v. Family Security Life Insurance Co.*, 336 U.S. 220, 93 L.ed. 632 (1949); *Tenney v. Brandhove*, 341 U.S. 367, 95 L.ed. 1019 (1951); *Barenblatt v. U. S.*, 360 U.S. 109, 3 L.ed.2d 1115 (1958); *Doyle v. Continental Ins. Co.*, 94 U.S. 535, 24 L.ed. 148 (1877); *Sunshine Anthracite Coal Co. v. Adkins*, 310

24. *Brown v. Board of Education*, *supra*; *Griffin v. County Board*, 377 U.S. 218, 12 L.ed.2d 218 (1964); *Adickes v. S. H. Kress & Co.*, _____ U.S. _____, 24 L.ed.2d 142 (1970). In each of these cases actual discrimination or unequal treatment existed. There is not here involved any classification based upon race as in *McLaughlin v. Florida*, 379 U.S. 184, 13 L.ed.2d 222 (1964), the other case relied on by Petitioners.

U.S. 381, 84 L.ed. 1263 (1940); *Sonzinsky v. U. S.*, 300 U.S. 506, 81 L.ed. 772 (1937); *Sipes v. United States*, D.C. 8, 321 F.2d 174 (1963), cert. den. 375 U.S. 913, 11 L.ed.2d 150 (1963); *United States v. Miller*, 307 U.S. 174, 83 L.ed. 1206 (1939).

The closing of the swimming pools not being in fact discriminatory or denying Petitioners the equal protection of the law, discussion of the motive of the city council in making its decision is thus irrelevant and immaterial. Motive behind municipal legislative action can only be examined where the action embodies a denial of constitutionally protected rights.

Or: Petitioners next argue: "B", The closing of all swimming pools was an act which was per se in violation of the equal protection of the Fourteenth Amendment.

No case cited by Petitioners so holds.

Petitioners rely on *Griffin v. The County School Board of Prince Edward County, Virginia*, 377 U.S. 218, 12 L.ed. 2d 256 (1964), involving the closing of the public schools in Prince Edward County, Virginia.

The relationship of a government to the operation of the public schools is not comparable to the furnishing of a recreational facility such as a swimming pool. The furnishing of such recreational facilities is the exercise of the discretionary proprietary power of a local government, although, of course, if operated they must be integrated. However, the operation of public schools is the exercise of a governmental power, usually required by state laws or constitutional provisions.

However in *Griffin* the Court merely held that the closing of the county school actually resulted in discrimi-

nation against the petitioners and a denial of the equal protection of the law under the Fourteenth Amendment for two reasons:

(1) The state was discriminating against Petitioners in that it was by public statewide taxation supporting the public schools in every other county of the state except in Prince Edward County.

(2) Both the county and state were discriminating against petitioners, in that they both contributed to the support of private schools in Prince Edward County, but not to any public schools therein.

That this was the basis for and the only basis for the holding of a denial of Fourteenth Amendment constitutional rights clearly appears from the following language in the opinion:

"For reasons to be stated, we agree with the District Court, that, under the circumstances here, closing the Prince Edward County Schools while public schools in all the other counties of Virginia were being maintained denied the petitioners and the class of Negro students they represent the equal protection of the laws guaranteed by the Fourteenth Amendment. . . . The new complaint charged that Prince Edward County was still using its funds, along with state funds, to assist private schools while at the same time closing down the county's public schools. . . . While the Louisiana plan and the Virginia plan worked in different ways, it is plain that both were created to accomplish [i.e., did accomplish] the same thing: the perpetuation of racial segregation by closing public schools and operating only segregated schools supported directly or indirectly by state or county funds. See *Cooper v. Aaron*, 358 U.S. 1, 17, 3 L ed 2d 5, 16, 78 S Ct 1401 (1958). Either plan works to deny colored students equal protection of the laws. Accord-

ingly, we agree with the District Court that closing the Prince Edward schools and *meanwhile contributing to the support of the private segregated white schools that took their place* denied petitioners the equal protection of the laws."

The Court in *Griffin* thus held that the children of all races had a right to public schools, if any children were being furnished such privileges by the county. This is a far cry from a holding that any citizens of Jackson have a constitutional right to recreational facilities, such as a public swimming pool, when none of the citizens thereof are being furnished such facilities and no such private facilities are supported by the City.

For some reason Petitioners rely strongly on *Evans v. Newton*, 382 U.S. 296, 15 L.ed.2d 373 (1966), and the successor case of *Evans v. Abney*, U.S., 24 L.ed.2d 634 (1970). The cases involved a park in Macon, Georgia which had been left by will of Senator Bacon to the Mayor and Council of the City of Macon to be used as a park for white people only. The City kept the park segregated for some years but later let Negroes use it on the ground that it could not maintain the park on a segregated basis. Suit was brought to have the Georgia Court appoint new private trustees to whom the title would be transferred. Thereafter the City resigned as Trustee. The Georgia Court accepted the resignation of the City as Trustee and appointed three individuals as new Trustees. On appeal the Supreme Court of Georgia affirmed. This Court reversed and held that under the particular circumstances the park must still be treated as a public institution subject to the Fourteenth Amendment, regardless of who had title under state law, and that it must be maintained on an integrated basis. The limited holding

of this Court in the first case is shown in the opinion as follows:

" . . . The momentum it acquired as a public facility is certainly not dissipated ipso facto by the appointment of 'private' trustees. So far as this record shows, there has been no change in municipal maintenance and concern over this facility. Whether these public characteristics will in time be dissipated is wholly conjectural. If the municipality remains entwined in the management or control of the park, it remains subject to the restraints of the Fourteenth Amendment. . . . We only hold that where the tradition of municipal control had become firmly established, we cannot take judicial notice that the mere substitution of trustees instantly transferred this park from the public to the private sector." (15 L.ed.2d at p. 378)²⁵

After the above decision the trustees filed another suit in the Georgia Court alleging that the trust had become unenforceable and the trust property had reverted to Senator Bacon's heirs. The Supreme Court of Georgia so held. This Court in the second case affirmed the Supreme Court of Georgia holding that the decision of the Supreme Court of Georgia did not violate the Fourteenth Amendment but that the court had merely exercised its judicial judgment in construing the will and that the holding of the reversion to the testator's heirs did not result in any discrimination, stating:

"Here the effect of the Georgia decision *eliminated all discrimination against Negroes in the park by eliminating the park itself, and the termination of the park was a loss shared equally by the white and Negro citizens of Macon since both races would have enjoyed a constitutional right of equal access to the park facilities had it continued.*" (24 L.ed.2d).

25. The case did not hold, as alleged by Petitioners in their brief, that State officials may not close public facilities to avoid integration.

This is the exact position of respondents here, i.e., that the decision of the City Council eliminated all discrimination against Negroes.

Petitioners then argue: "C", The City could not justify closing its swimming pools on the ground that they could not be operated economically or safely on an integrated basis.

We can admit that no municipality can justify operating such facility *on a segregated basis* on the ground that the operation thereof is neither economical nor safe. This was the only holding of any of the cases relied on by Petitioners.²⁶

On the other hand, the promotion of public peace and the preservation of the economic condition of the City would justify an exercise of the police power of the City where it did not result in unequal treatment or deny any citizens any of their constitutional rights. *Mosher v. Beirne*, C.A. 8, 357 F.2d 638 (1966); *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80, 90 L.ed. 1096 (1946); *East New York Savings Bank v. Hahn*, 326 U.S. 230, 90 L.ed. 34 (1945); *Hughes v. Superior Court of California*, 339 U.S. 460, 94 L.ed. 985 (1950); *Day-Brite Lighting v. State of Missouri*, 342 U.S. 421, 96 L.ed. 469 (1952); *Buck v. Bell*, 274 U.S. 200, 71 L.ed. 1000 (1927); *El Paso v. Simmons*, 379 U.S. 497, 13 L.ed.2d 446 (1965).

This Court has not suggested that the police power of the State could not be exercised in its discretion where,

26. For example: In *Buchanan v. Warley*, 245 U.S. 60, 62 L.ed. 149 (1917) it was merely held that the position that segregation would promote the public peace by preventing race conflicts did not justify the denial of constitutional rights. To the same limited effect was *Cooper v. Aaron*, 358 U.S. 27, 3 L.ed.2d 1 (1958). Similarly, in *Watson v. City of Memphis*, 373 U.S. 526, 10 L.ed.2d 529 (1963), the Court would not justify continuance of segregation in the parks on the ground of safety and economy.

to paraphrase the language of *Evans v. Abney*, supra, the effect of the exercise thereof will not cause but would eliminate all discrimination against Negroes by eliminating the swimming pools themselves and the termination of the operation thereof would be a loss shared equally by the white and Negro citizens of Jackson.

The result of the closing of all pools because they could not be operated safely and economically on an integrated basis did not deprive Negroes of the equal protection of the law. There is no constitutional right of any citizen to have access to a public swimming pool where no other citizen has such access. The City did not, therefore, need what Petitioners call its "excuses" in order to cease to operate this discretionary proprietary function of the City.

Petitioners then argue: "D", The closing of the pools to all citizens is unequal because the closing had a worse effect on the black citizens than it did on the white.

There is no proof whatsoever to support any such allegation. Let us assume that the closing has a worse effect on middle class citizens or on the poor, but on citizens of both races who are middle class or poor, than it did on a few wealthy citizens in the City of Jackson. As pointed out in Judge Rives' opinion in the court below:

"... The equal protection clause does not promise or guarantee economic or financial equality. In applying the requirements of the equal protection clause, this court cannot require a city to operate a public swimming pool solely because the city's ceasing to do so forecloses the enjoyment by financially less fortunate citizens [of both races] of recreational facilities available on a complete private basis to the more affluent."

If there is any inequality it is purely financial, not racial. As many white citizens as black are denied any such facility.

"The guaranty of the Fourteenth Amendment of the equal protection of the laws is not a guaranty of equality of operation or application of state legislation upon all citizens of a state." *Stebbins v. Riley*, 268 U.S. 137, 69 L.ed. 884 (1925).

Not every denial of a right conferred by state law involves a denial of the equal protection of the laws, even though the denial of the right to one person may operate to confer it upon another. Exact equality is no prerequisite of equal protection. *Norvell v. State of Illinois*, 373 U.S. 420, 10 L.ed.2d 456 (1963).

Very pertinent is the decision in *Coopage v. Kansas*, 236 U.S. 1, 59 L.ed. 441 (1915), wherein it is held that the legislature of a state cannot constitutionally remove normal inequalities, stating:

"... No doubt, wherever the right of private property exists, there must and will be inequalities of fortune; ... And, since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights."

The thrust of *Griffin*, *supra*, was not that the closing of the schools bore more heavily on Negro children than on white children as a mere result of the closing but that it bore more heavily on the Negro children because there was an actual discrimination against them in that the county and state were contributing to the support of private

schools for white only. It was this discriminatory treatment, in the vital field of education,²⁷ upon which the denial of equal protection of the law was based.

The furnishing of a swimming pool is not such a basic function of a city or such a basic public responsibility. While admittedly where a city has undertaken to provide swimming pools they must be available to all citizens on equal terms, still by a decision to no longer provide such facilities as swimming pools no one is deprived of any constitutional right.

Petitioners are in error in stating that this Court has declared unconstitutional statutes equally applicable to all races. They have misunderstood *Loving v. Virginia*, 388 U.S. 1, 13 Led.2d 1010 (1967), involving a statute of Virginia forbidding the intermarriage of whites and Negroes. The Court did not hold that this statute was applicable on its face to both black and white citizens alike. This was the contention of the state and the Court held otherwise. The Court held that the statute was based on an unconstitutional classification by race by a denial of some, but not all citizens to marry. This is clear from the language in the opinion.²⁸

27. "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. . . . Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Brown v. Board of Education*, supra, at p. 830.

28. "There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races. Over the years, this Court has consistently repudiated '[d]istinctions between citizens solely because of their ancestry' . . . We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restrict-

In *Anderson v. Martin*, 375 U.S. 399, 11 L.ed.2d 430 (1963), the necessary effect of the statute was held to be invidious discrimination.

Thus, the legislative decision of the City Council here is not only applicable on its face to both black and white citizens but as actually applied is equally applicable to both black and white citizens.

Finally Petitioners argue: "E", The City has fostered private discrimination in swimming pools.

Petitioners have failed to prove any such allegation. There were private segregated pools in the City of Jackson before the City closed its pools. There are still privately owned segregated pools. There is no proof that during the two years after the closing of the pools and before this suit was brought that any additional private swimming facilities were developed. There is no proof of the allegation by Petitioners that the City has "insured that private swimming pools *will be developed* to take their place (i.e., the place of the closed pools)".

Apparently Petitioners rely only on the fact that the City relinquished its lease on the Leavell Woods Pool to its owners, the Leavell Woods Community Foundation, a private corporation. The City did not own the pool but merely had it under lease and terminated its lease. What the Foundation is doing with the pool, its own property, is beyond any control of the City and is unknown to the City. The City has no contract with the Foundation. There is no maintenance of or management of and control over the pool by the City as in *Evans v. Newton*, *supra*.

ing the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause. . . . The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations."

The District Court below in its letter opinion of September 14, 1965 stated: "The evidence does not support the plaintiffs' contention as to the Leavell Woods Pool which does not belong to the City but was leased by the City and that lease was terminated by the City as lessee several years ago" (A. 24). There was no proof whatsoever of any contractual relationship between the City and the Foundation. The City Council has no right to control and has not purported to nor made any effort to control or influence the use of private pools with which the City has no connection.

The City here has not leased its pools to private individuals and therefore has not placed "its power or property or prestige behind . . . (any) discrimination" as in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 6 L.ed.2d 45 (1961). There is no state participation in any segregated pools "through any arrangement, management, funds or property". Cf. *Cooper v. Aaron*, supra.

In *Tate v. Department of Conservation*, 133 F.Supp. 53 (1955), aff'd 231 F.2d 615 (1956), cert. den. 352 U.S. 838, 1 L.ed.2d 56 (1956), the Court held that if the state leased its public parks it would have to see that they were operated without discrimination. However, the Court carefully added: "If, in the wisdom of the leaders of this Commonwealth, it is determined to close Seashore State Park, this is not a matter for determination by the Court."

The City is not here aiding or assisting or subsidizing or supporting in any way any private pools as in *Poindexter v. Louisiana Financial Assistance Commission*, D. C. La., opinion unprinted, cited by Petitioners, where the State authorized the payment of state tuition grants for children in private schools.

The City here has enacted no ordinance or regulation requiring segregation of swimming pools, making inapplicable *Peterson v. City of Greenville*, 373 U.S. 244, 10 L.ed.2d 323 (1963), and *Robinson v. Florida*, 378 U.S. 153, 12 L.ed.2d 771 (1964), relied on by Petitioners. No official of the City here has announced that the City would not permit integrated private swimming pools, making inapplicable *Lombard v. Louisiana*, 373 U.S. 267, 10 L.ed.2d 338 (1963), relied on by Petitioners.

The fallacy of Petitioners' argument is apparent:

Totally inapplicable, and only confusing the issue, are cases relied on by Petitioners where actions are brought against private citizens for discrimination and the issue was whether this discrimination was state action because authorized by or an instrument of the state, i.e., *Reitman v. Mulkey*, 387 U.S. 369, 18 L.ed.2d 830 (1967)²⁹, and *Adickes v. S. H. Kress & Co.*, U.S., 24 L.ed.2d 142 (1970).²⁹ This issue is simply not involved here.

i.e., *Reitman*, supra, an action against private owners of property for actual discrimination in rental thereof, merely held within Fourteenth Amendment because of involvement of State through a California Constitutional provision.

i.e., *Adickes*, supra, cited by Petitioners nine times in their brief, an action brought to recover damages from a private corporation (Kress & Co.) for admitted discrimination in refusing to serve plaintiff in its restaurant facilities. The question involved was merely whether or not this discrimination was within the Fourteenth Amendment as "State Action".

This is not an action to prevent discrimination by third parties. There is no question here but that the act of the

29. As well as *Burton*, *Peterson*, *Robinson* and *Lombard*, supra, relied on by Petitioners previously referred to.

City in closing its own pools was a State action. By merely closing its own pools and ceasing to operate them and deciding not to furnish this recreational facility to any citizen the City did not itself deny equal protection of the law to Petitioners.

If Petitioners are correct in their allegations that since this decision of the City private citizens are discriminating in private pools on account of race and that their acts are in violation of the Fourteenth Amendment because there can be said to be City involvement, which is denied, then the cause of action of Petitioners is against the private persons who are discriminating. Thus, if Leavell Woods Community Foundation, a private Mississippi corporation, is discriminating against Petitioners by denying them the right to swim in its pool, then Petitioners' cause of action is against that corporation and they can there argue if they desire that it is State action and therefore within the Fourteenth Amendment. The Foundation cannot be controlled by this action. The City cannot control it.

Petitioners cite no case where the Courts have taken affirmative action against a State or a City because of private discrimination, even though there was indirect State involvement in the private discrimination. Where the governmental agency itself is not discriminating or denying equal protection of the law, then the relief for any discrimination by any third party must be against that third party.

We do not need to nor purport to answer the question of whether or not any private persons, corporations or individuals operating segregated swimming pools in the City could be subjected to suit on the ground that it constituted State action. All that Respondents submit is that the City of Jackson cannot be forced by mandamus to provide swimming pool facilities to its citizens, if none is provided

to any citizen, merely because there may be discrimination by private individuals or corporations in the operation of private pools and certainly not where the City did not cause, assist or participate in such discrimination.

POINT III

Petitioners Are Not Entitled to Injunctive Relief on the Ground That Respondents Closed the City Pools with the Intent to Punish and for the Purpose of Punishing Negroes in the Community for Resorting to Litigation in Clark.

Petitioners ask the Court to assume that by the closing of the swimming pools Jackson Negroes were being punished by the City because they brought the prior *Clark* suit in the Federal Court. They have entirely overlooked the fact that there is no proof that the act of the City complained of was done with the intent to punish or for the purpose of punishing the Petitioners because of the prior *Clark* litigation.

This position of Petitioners is an afterthought. It was not pled as a ground for relief in the court below and no proof was offered to substantiate any such claim.³⁰

It is quite true that Petitioners and any citizens have a right to bring a suit in a Federal Court to redress constitutional grievances and cannot be deprived of this right by threats, intimidations, arrests, etc. It is true that a City does not have a right to intentionally and purposefully deprive Negro citizens of *constitutional rights* for redressing grievances in the Federal Court. However, here (1) Petitioners have not been deprived of any right to litigate,

30. This position of Petitioners here is grasped from a few general remarks made by Judge Wisdom in his dissenting opinion in the court below (A. 71-72). He merely said that the successful prior litigation had taught Negroes a lesson and that Negroes would now think twice before contesting segregated facilities. He did not purport to say that the closing of the pools was the result of an intent and purpose on the part of the City to punish Jackson Negroes.

and (2) Petitioners have not been deprived of any constitutional rights because of prior litigation. One or the other is a prerequisite to relief for punishment and neither are present here.

Moreover the intent and motive of the City in closing the city pools is a question of fact and there is no proof whatsoever here that the City closed the pools for the purpose of punishing Negro citizens for the prior litigation.

The earlier litigation referred to, *Clark*, supra, was brought as a class suit by Negro citizens against the City and sought the integration of public parks, libraries, zoos, golf courses, playgrounds, auditoriums and all other recreational facilities of the City. All were integrated thereby. The City did not punish the Negro citizens by closing any of these other recreational facilities. There has been other litigation against the City of Jackson by Negro citizens and as a result thereof public buildings, schools, transportation facilities, etc., have been integrated. There has been no closing of any of these facilities or any portions thereof after the litigation. Only the swimming pools, and all swimming pools, were closed and the undisputed proof is that they were closed because the operation of swimming pools on an integrated basis would in the best judgment and discretion of the City Commissioners lead to a large economic loss to the City and prevent the enforcement of law and order.³¹

There is no suggestion that the City in any way tried to prevent the filing of the *Clark* suit, i.e., by threats, intimations, etc. There is not one iota of proof that the City of Jackson has ever by threats, intimidations or in any other manner threatened the closing of any public facilities

31. It is, of course, unfortunate that a few thousand Negroes have thus been deprived of the pleasure of swimming in the City pools. It is unfortunate that at least an equal number, if not more, white citizens have been denied this same pleasure.

should any other litigation be brought. The City did not appeal from the decision of the District Court.

Petitioners suggest as if supporting their position that Congress by the National Labor Relations Act, 29 U.S.C. 158(a)(4)³² has made it an unfair labor practice for a union to restrain or coerce an employer because he had brought a complaint to the National Labor Relations Board.

However, Petitioners here do not come within the rules applicable to such unfair labor practices. For example: In *N.L.R.B. v. Almeida Bus Lines*, C.A. 1, 333 F.2d 725 (1964), an employee claimed that he was fired because of his union activities. The employer alleged that he was fired because he had had too many accidents. The Court in reversing the finding of the Board that there had been an unfair labor practice stated:

" . . . But it is not for the Board to determine whether or not an employer's business judgment was too harsh under the circumstances. Rather, the burden is on the Board to show that an improper motive dictated the employer's decision to fire its employee and absent such a showing, the employer's right to make such a decision must be respected. *N.L.R.B. v. United Parcel Service, Inc.*, 317 F.2d 912 (1st Cir. 1963); *National Labor Rel. Bd. v. Houston Chronicle Pub. Co.*, 211 F.2d 848 (5th Cir. 1954)."

Or as stated in *Keilwood Company v. N.L.R.B.*, C.A. 8, 411 F.2d 493 (1969):

" . . . The burden of proving an improper motivation in making the discharge is upon the General Counsel. An employer's general hostility to the Union does not standing alone supply an unlawful motivation for a specific discharge for good cause."

32. Justified under the Commerce Clause of the Constitution.

See *N.L.R.B. v. Dominick's Finer Foods*, C.A. 7, 367 F.2d 781 (1966). Also *N.L.R.B. v. Gotham Industries*, C.A. 1, 406 F.2d 1306 (1969).

Moreover, the burden on the employee is to prove his case by "substantial evidence pointing toward unlawful motive." *N.L.R.B. v. Winn-Dixie Stores*, C.A. 5, 410 F.2d 1119 (1969); *N.L.R.B. v. Sands Mfg. Co.*, 306 U.S. 332, 83 L.ed. 682 (1939).

Petitioners do not mention the requirements of the National Labor Relations Act that a business should not be closed because of union activities by employees. See *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 13 L.ed.2d 827 (1965), holding, where there were no threats of closing to discourage unionization: ". . . When an employer closes his entire business, even if the liquidation is motivated by vindictiveness toward the union, such action is not an unfair labor practice."³³

Curtailement or partial suspension of operations motivated by economic reasons does not constitute unfair labor practice. *N.L.R.B. v. Dale Industries*, C.A. 6, 355 F.2d 851 (1966); *N.L.R.B. v. Lassing*, C.A. 6, 284 F.2d 781 (1960). Cf. *N.L.R.B. v. Brown*, 380 U.S. 278, 13 L.ed.2d 839 (1965).

Moreover, in the *N.L.R.B.* cases the right of the Government to forbid the closing of a business or the discharge of employees in retaliation for union activities was pursuant to a Federal Statute enacted under the Commerce Clause and applicable only to businesses involving interstate commerce. Congress has enacted no such statute forbidding the closing by municipalities of a purely local recreational facility nor would such a statute be justified un-

33. See particularly Note 20, 13 L.ed.2d at p. 836.

der any provision of the Constitution. Petitioners here do not come within the provisions of 42 U.S.C. 1981.³⁴

Equally inapplicable are cases relied on by Petitioners under § 203(c) of the *Civil Rights Act of 1964*, regulating the segregated use of public lunch rooms "dealing extensively in interstate commerce" (i.e. under the Commerce Clause) and prohibiting punishments by criminal prosecution of any person for exercising his right or privilege with reference thereto, i.e., *Hamm v. Rock Hill*, 379 U.S. 306, 13 L.ed.2d 300 (1964), or, indirectly, *State of Georgia v. Rachel*, 384 U.S. 780, 16 L.ed.2d 925 (1966). Here respondents have not punished or attempted to punish Negro citizens by criminal prosecution.

We are unable to understand Petitioners' reliance on *NAACP v. Buntin*, 371 U.S. 415, 9 L.ed.2d 405, which held unconstitutional Chapter 33 of the Laws of Virginia forbidding solicitation of legal business by an agent of organizations in connection with actions to which the organization was not a party, i.e., a deliberate attempt to suppress litigation. The Court merely held that this State statute as applied to the NAACP denied *First Amendment* rights of the Negro minorities. There is not involved here any statute of the State of Mississippi or Ordinance of the City of Jackson or any acts of such governmental entities which tended to or attempted to or had the result of depriving Negro citizens of any *First Amendment* rights or right to bring the *Clark* litigation or any other litigation.³⁵

34. There is simply not involved any right to make and enforce contracts, to sue, be parties, give evidence or the right to full and equal benefit of all laws and proceedings for the security of persons and property enjoyed by white citizens.

35. This citation is a typical example of Petitioners' attempt to pick up a clause out of context from a decision and base a new principle of law thereon without consideration of the holding of the case from which the clause is extracted, i.e., "litigation may well be the sole practical avenue open to a minority to petition for redress of grievances".

Equally inapplicable is Petitioners' citation of *Dombrowski v. Pfister*, 380 U.S. 479, 14 Led.2d 22 (1965), where the court merely held that a State could not "chill" the exercise of constitutional rights by means of threats of criminal prosecution, with no hope of success, made only to discourage civil rights litigation. There were and are no such threats made by the City here either before or since the *Clark* case.

Petitioners cite *Sullivan v. Little Hunting Park, Inc.*, 398 U.S. 306, 24 Led.2d 386 (1969), which involved a deprivation of a "fundamental right" of the ownership of property. In that case there was no question of fact. It was admitted that plaintiff was deprived of his constitutional property rights in a club solely because of an assignment of the same to a Negro. The Court merely held he could not be expelled from the club for that reason.

Petitioners cite *Edwards v. Habid*, C.A. D.C., 397 F.2d 687 (1968), cert. den. 393 U.S. 1016, 21 Led.2d 560 (1969), where there was an alleged deprivation of constitutional rights of property of a tenant purportedly in retaliation for the tenant's complaints to the Housing Authorities. The Court reversed to allow the tenant "... to try to prove to a jury that her landlord who seeks to evict her harbors a retaliatory intent". The court then pointed out that the question of permissible or impermissible purpose is one of fact for the court or jury and that such a determination "is not easy to prove".

Similarly Petitioners cite *United States v. Board of Education of Greene County, Mississippi*, C.A. 5, 332 F.2d 40 (1964), where there was involved the "fundamental right" to vote. The action was brought by a Negro teacher under 42 U.S.C. 1971(b) forbidding the intimidation or threatening of any person for the purpose of interfering with their right to vote. The plaintiff alleged that she had

been refused re-employment because she had filed an affidavit with the Justice Department complaining of the Registrar's refusal to register her to vote. The Court in refusing to require the school board to re-employ her, stated:

" . . . The determination of design, motive, purpose, or intent is also dependent upon the testimony produced at the trial . . . Findings as to intent, motive, purpose, or design are not to be tried de novo, but such findings are to be reviewed by the same standards applied in reviewing other facts."

However the fallacy of Petitioners' argument is that they were neither deprived of their right to litigate nor deprived of any constitutional right. Where there is no inequality, the right to have a city furnish any certain public recreational facility is not a constitutional right. No act of Congress has required or could require it under the Constitution. The City merely did what it had a right to do.

CONCLUSION

Respondents respectfully submit that this cause should be affirmed.

Respectfully submitted,

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1970

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NO. 107

JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1970

HAZEL PALMER, ET AL.,

Petitioners,

versus

**ALLEN C. THOMPSON, Mayor,
CITY OF JACKSON, ET AL.,**

Respondents.

**MOTION FOR LEAVE TO FILE BRIEF AMICUS
CURIAE AND BRIEF AMICUS CURIAE**

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

NO. 107

HAZEL PALMER, ET AL.,
Petitioners,
versus

ALLEN C. THOMPSON, Mayor, City of Jackson,
ET AL.,
Respondents.

**MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE**

Four black citizens of four cities of Mississippi respectfully seek leave to file the attached brief *Amicus Curiae*. The attorney for petitioners has consented; the attorney for respondents has refused consent.

These same four persons made a motion for leave to file an *amicus* brief in support of the petition for certiorari in this cause. That earlier motion was granted. 397 U.S. ____, 90 S.Ct. 1364 (1970).

The *Amici Curiae* are as follows: James Moore, Greenwood, Mississippi; C. O. Chinn, Canton, Missis-

issippi; Willie Crump, Edwards, Mississippi; and Minnie McFarland, West Point, Mississippi. The issue involved in this suit, the closing of the public swimming pools in the City of Jackson after a federal court order desegregating those pools had been obtained, is of vital concern to them because a similar pattern of events has taken place in each of their cities. All four cities formerly had public swimming pools which were used by white people only and which, after attempts to integrate them, were closed or conveyed to private groups that continued the white-only policy.

In three of the cases there has been litigation in which *Amici* were or are named plaintiffs representing the class of all black residents of those cities. There was no litigation in West Point but Mrs. McFarland is the mother of one of the boys who sought to integrate the pool there on July 4, 1964.

Amici seek leave to file this brief in order to demonstrate that the practice of closing public facilities is an integral part of a pattern of racial segregation, to bring to the Court's attention certain lines of analysis and to emphasize particular relevant Congressional debates and early opinions by Justices of this Court.

Respectfully submitted,

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BRIEF AMICUS CURIAE

THE INTEREST OF AMICI CURIAE IN
PALMER v. THOMPSON

Amici are residents of Canton, West Point, Edwards and Greenwood, towns in Mississippi where the public swimming pools have also been closed to prevent their integration. The facts surrounding the closing of the pools in each of these towns and the resultant litigation in which *Amici* have been involved is set forth in detail in our *Amicus* brief on the petition for certiorari, pp. 1-3. Therefore, we believe we need only note here that the outcome of these struggles to obtain integrated swimming facilities in these other towns hinges on the outcome in *Palmer v. Thompson*.

ARGUMENT

1. CLOSING A PUBLIC SWIMMING POOL SOLELY TO PREVENT BLACK CITIZENS FROM COMMINGLING WITH WHITE IS AN ASSERTION OF THE INFERIORITY OF BLACK PEOPLE AND THEREFORE A DENIAL OF EQUAL PROTECTION PROHIBITED BY THE FOURTEENTH AMENDMENT.

When black plaintiffs obtained a federal court order requiring the integration of the swimming pools operated by the City of Jackson, Mississippi, *Clark v. Thompson*, 206 F.Supp. 539 (S.D.Miss., 1962), *aff'd* 313 F.2d 673 (C.A.5, 1963), *cert. den.* 376 U.S. 951 (1963), the City responded by closing four of its five pools and cancelling the lease it held on the fifth. When the present suit was instituted to compel a reopening of the pools on an integrated basis, two of the defendants, Allen Thompson, Mayor of Jackson, and George Kurts, City Director of Recreation, conceded in their affidavits that the pools were closed in order to prevent racial integration. Although the United States Court of Appeals for the Fifth Circuit was almost equally divided on the legal issues in this case, it was in unanimous agreement that the pools were closed by the City to prevent the commingling of the races.¹

¹ Respondents have claimed that while it is true the pools were closed to enforce separation of the races, the named defendants did not act with the intention of discriminating against black people. This attempted distinction is a differentiation without a difference. Whether the respondents closed the pools because of the racial prejudice that they themselves felt as individuals or whether they closed the pools because of the racial prejudice of other whites in Jackson is of no constitutional moment. "It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith." *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961). The fact is that racial prejudice caused the City to close a public facility in order to prevent its integration. In *Shelley v. Kraemer*, 334 U.S. 1 (1948), that the judge who enforced the restrictive covenant did not intend to discriminate

The main thrust of the majority opinion below was that blacks were not denied equal protection because the closings operated equally on black and white alike: neither had the opportunity to use the pools. 419 F.2d 1222, 1225-1227 (C.A.5, 1969). Moreover, if black people could not gain access to privately operated pools, that was merely the result of economic disparity, a kind of discrimination against which the equal protection clause offers no protection. 419 F.2d at 1227.

The majority recognizes that black people, unlike their white counterparts, cannot turn to the many privately operated pools in Jackson now that the public swimming facilities are closed. The majority has misunderstood, however, the nature of the discrimination that has wrought this condition. It is not economic, it is racial. There are many black residents of Jackson who now wish to join private pools and who have the money to do so. The reason that no black person has the use of a private swim club or pool is that black people are excluded from them solely because of their race. In *Griffin v. School Board of Prince Edward County* this Court observed that closing the Prince Edward public schools "bears more heavily on Negro children in Prince Edward County since white children there have accredited private schools which they can attend, while colored children until very recently have had no available private schools, and even the school they now attend is a temporary expedient."

against the petitioners was irrelevant. It was enough that in enforcing the racial covenant he had given his official imprimatur to the racial prejudices of private individuals. Cf. *Terry v. Ohio*, 392 U.S. 1, 13 (1968). Similarly, "free transfer" and "freedom-of-choice" school plans have been declared a denial of equal protection even where it is private individuals, parents and children, who are motivated by prejudice, rather than the governmental agency, the school board. See, E.g., *Monroe v. Board of Commissioners*, 391 U.S. 450 (1968); *Green v. County School Board*, 391 U.S. 430 (1968). Cf. *Harmon v. Tyler*, 273 U.S. 668 (1927).

377 U.S. 218, 230 (1964). Cf. *Hunter v. Erickson*, 393 U.S. 385, 391 (1969). Similarly, closing the Jackson public swimming pools bears more heavily on black children since white children there have privately owned pools of which they can make use, while black children are excluded from all privately operated pools solely because of their race. The majority below was in error when it concluded that the closing affected blacks the same as whites.

Nevertheless, even if that majority has been correct in its assumption that the tangible effect of the closings was the same on both races, the closings here would still deny black people equal protection. This is best seen when the focus is on the act of closing, itself, rather than on the subsequent non-operation of the pools.

After *Brown v. Board of Education*, 347 U.S. 483 (1954), this Court held that racial segregation in a wide variety of public facilities was a denial to black people of equal protection.² The holding in each case was not premised on a finding of a tangible or material inequality in the facility. In *Johnson v. Virginia*, for example, there was no measurable difference to a black man whether he sat on the right side of the courtroom or on the left. Rather, these decisions were based on the conclusion that "separate . . . facilities are inherently unequal." *Brown v. Board of Education*, 347 U.S. at 495. (Emphasis added.) To intentionally separate black people from white is to affirm the inferiority of the former. The prohibition of integration is a reassertion of the fundamental premise of *Dred Scott v. Sandford*: black people are "beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations." 19 How. 393, 407 (1857). See *Fer-*

guson v. Gies, 82 Mich. 358, 365-8, 46 N.W. 718, 720-1 (1890). This is true whether the prohibition is by way of segregation or by way of closing to avoid racial mixing. The closing of the Jackson pools was premised on the *Dred Scott* doctrine and a step toward its revitalization. It was a declaration by the city that blacks are so inferior that they could not be allowed to swim in the same pools as whites, for fear that persons of different races might come into physical contact. See *Williams v. Kansas City*, 104 F.Supp. 848, 852-3 (W.D.Mo., 1952), *aff'd.* 205 F.2d 47 (C.A.8, 1953), *cert. den.* 346 U.S. 826 (1953).² It was precisely this kind of move backward toward slavery that the Fourteenth Amendment was designed to prevent:

The words of the amendment, it is true are prohibitory, but they contain a necessary implication of a positive immunity, a right, most valuable to the colored race, — the right to exemption from unfriendly legislation against them distinctively as colored, — exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps toward reducing them to the condition of a subject race. *Strauder v. West Virginia*, 100 U.S. 303, 307-8 (1880).

² *Muir v. Louisville Park Theatrical Association*, 347 U.S. 971 (1954) (city lease of park facilities); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (beaches); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (golf courses); *Gayle v. Browder*, 352 U.S. 903 (1956) (busses); *New Orleans City Park Improvement Association v. Detiege*, 358 U.S. 54 (1958) (parks); *Turner v. City of Memphis*, 369 U.S. 350 (1962) (administrative regulation requiring segregation in airport restaurant); *Johnson v. Virginia*, 373 U.S. 61 (1963) (courtrooms); *Schiro v. Bynum*, 375 U.S. 395 (1964) (auditoriums).

³ This reality cannot be answered by the claim that only black people see the closing as attaching to them a stigma, that white people do not see the closing as an assertion of white supremacy. This kind of allegation, first raised in *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896), reflecting as it does the insensitivity and lack of understanding by whites of black people, has been put to rest. *Brown v. Board of Education*, *supra*.

The Jackson pools were closed solely because black people were about to use those which had always been reserved to whites. The pools would not have been closed if white people who, for whatever reason, had never used the "white" pools before were about to begin making use of them.⁴ The closings therefore were a singling out of black people, a treatment prohibited by the Fourteenth Amendment. For "[t]he very fact that colored people are singled out . . . because of color, though they are citizens . . . is practically a brand upon them, affixed by the law, an assertion of their inferiority. . . ." *Strauder v. West Virginia*, 100 U.S. at 308.

The closings acted as punishment of the black people who had sought to integrate Jackson's pools. The closings effectively thwarted their constitutionally protected attempt to integrate. Moreover, black people who formerly had the use of one pool now have the use of none; they have only the animosity of whites whose use of public pools has also been foreclosed and who recognize that the

⁴ In this respect, it can be seen that the classification discussed by the majority below, which lead to its ultimate holding, was essentially artificial. Not only did the majority err in its conclusion as to the relative effect of the closings on the two groups, white and black, that were subject to the closings, see fn. 1, *supra*, it also erred in comparing those two groups in the first instance. The meaningful comparison is between the black people who sought originally in *Clark v. Thompson*, *supra*, to use the formerly all-white pools and any all-white group that might have sought to use those same pools for the first time. The pools were closed in the former instance; they would not be closed in the latter. Analyzing the problem in this way, rather than in terms of the majority's largely obfuscatory classification below, makes clear the denial to black people of equal protection. The problem here is similar to that in *Loving v. Virginia*, 388 U.S. 1 (1967). Virginia claimed that the statute forbidding interracial marriages applied equally to both spouses and thus denied no one equal protection. But Virginia, like respondent here, was talking about the wrong classification. Instead of comparing the effect of the statute on the wife with its effect on the husband, proper analysis called for a comparison of a black woman's ability to marry a white man with a white woman's ability to marry the same man and, conversely, a comparison of a black man's ability to marry a white woman with a white man's ability to marry the same woman.

closings are traceable to the efforts of the black plaintiffs in *Clark v. Thompson*, *supra*.⁵ The black people of Jackson would be better off today if the complaint in *Clark v. Thompson* had never been filed. They have suffered substantially, both physically and psychologically, because of that litigation. And yet the Fourteenth Amendment was designed to relieve black people of special burdens:

No one can fail to be impressed with the one pervading purpose found in all the [Wartime] Amendments, lying at the foundation of each, and without which none of them would have been suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over them. [*Slaughter-House Cases*, 16 Wall. 36, 71 (1873).]

This language has been quoted so frequently it has become cliché and, in that way, curiously devoid of meaning. But that meaning must be revitalized. If the language of the *Slaughter-House Cases* is something more than cliché, if the Wartime Amendments "were intended to take away all possibility of oppression by law because of race or color," *Ex parte Virginia*, 100 U.S. 339, 345 (1880), then surely the oppression that the black people of Jackson have suffered since the "victory" in *Clark v. Thompson*, is a violation of the Fourteenth Amendment.

The argument of the respondent here, that the closing

⁵ While it is true that whites no longer have the use of public pools either, "Discriminations that operate to the disadvantage of two groups are not less to be condemned because their impact is broader than if only one were affected." *Henderson v. United States*, 339 U.S. 816, 825-6 (1950). Cf. *Shelley v. Kraemer*, 334 U.S. 1, 21-2 (1948). See Fn. 1.

applies equally to black and white, is hauntingly familiar. Its origins lie with the majority opinion in *Plessy v. Ferguson*, 163 U.S. 537 (1896). Because its separate-but-equal claim has now been overruled, it is proper and instructive to turn to the dissenting opinion in *Plessy* of the first Mr. Justice Harlan:

It was said in argument that the statute of Louisiana does not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But this argument does not meet the difficulty. Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. . . . *The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while travelling in railroad passenger coaches.* . . . (163 U.S. at 556-7 (Emphasis added.)

Just as the Louisiana statute in *Plessy* sought to compel black people to remain apart from whites, the action of the City of Jackson in closing the pools was designed to achieve the same result. Under Mr. Justice Harlan's analysis the closings are a clear denial of equal protection.

In *Evans v. Abney*, this Court assumed that the closing of a publicly owned facility solely to avoid the effect of a prior court order directing that the facility be integrated would violate the Equal Protection Clause. 396 U.S. 435, 445 (1970). The assumption is supported by prior case law. In *Griffin v. School Board of Prince Edward County*, 377 U.S. 218 (1964), this Court held that the closing of public schools in the county to avoid their integration was a

denial to the black plaintiffs of equal protection. While schools in other counties in Virginia remained open and while the state was attempting to aid private schools through the use of public funds, these facts do not distinguish *Griffin* from the present case. Its fundamental thrust is just as relevant where, as here, Jackson has closed all its pools to ensure that white and black children in Jackson will not under any circumstances use the same pool:

Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional. (377 U.S. at 231).

To the same effect is *Aaron v. McKinley*, 173 F.Supp. 944 (E.D.Ark., 1959), *aff'd*, *sub nom. Faubus v. Aaron*, 361 U.S. 197 (1959).

In *Bush v. Orleans Parish School Board*, 187 F.Supp. 42 (E.D.La., 1960), *aff'd* 365 U.S. 569 (1961) and 188 F.Supp. 916 (E.D.La., 1960), *aff'd* 365 U.S. 569 (1961), acts of the Louisiana Legislature giving the Governor the power to close all schools in the state if any one of them was integrated were declared to be in violation of the Equal Protection Clause. In *Holmes v. Danner*, 191 F. Supp. 394, 412-3, 415-6 (M.D.Ga., 1961), the Governor of Georgia was enjoined from closing the state university to prevent its integration. *Garrett v. Faubus*, 230 Ark. 445, 323 S.W.2d 877 (1959), dealt with the Arkansas statute (later declared unconstitutional in *Aaron v. McKinley*, *supra*) giving the Governor authority to close any schools whenever he determined there was an impending threat

to law and order or that an effective educational system could not be maintained due to racial integration. Although the Court found no constitutional infirmity, it said: "If Act 4 is viewed as giving the Governor the power to close all public schools permanently, it would, we concede, be in violation . . . of the decree in the *Brown* case." 323 S.W.2d at 880.

The majority below has suggested that race may sometimes be a permissible consideration. The definitive analysis of this question is by Judge Wisdom in *United States v. Jefferson County Board of Education*, 372 F.2d 836, 876-8 (C.A.5, 1966), *aff'd en banc* 380 F.2d 385 (1967). Part of the first paragraph of the discussion is a proper summary:

The Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination. *The criterion is the relevancy of color to a legitimate governmental purpose.*" (372 F.2d at 876.) (Emphasis added.)

Applying that standard to the case at bar it is clear that race is irrelevant and therefore an impermissible consideration. Consideration of race in closing Jackson's pools results only in the imposition of the burden or stigma of inferiority. "The prejudice against association in public places with the negro, which does exist . . . is unworthy of our race; and it is not for the courts to cater to or temporize with a prejudice which is not only not humane,

but unreasonable. . . ." *Ferguson v. Gies*, 82 Mich. 358, 46 N.W. 718, 721 (1890). See, e.g., *Anderson v. Martin*, 375 U.S. 399 (1964); *Hamm v. Virginia State Board of Elections*, 230 F.Supp. 156 (E.D.Va., 1964), *aff'd* 379 U.S. 19 (1964); *Goss v. Board of Education*, 373 U.S. 683, 688 (1963).

In closing Jackson's pools, respondents have simply employed a different technique in the continuing struggle to preserve the wall of racial separation, a variation on an old theme.⁶ Respondents have contended, however, that while the pools were closed to prevent racial mixing, it was only to preserve law and order and to avoid the financial loss that the City would incur with integration. These claims are not constitutionally acceptable. Law and order is not an acceptable reason for preserving separation of the races by continuing segregation. *Cooper v. Aaron*, 358 U.S. 1, 16 (1958); *Watson v. City of Memphis*, 373 U.S. 526, 535 (1963); *Brown v. Board of Education*, 349 U.S. 294, 300 (1955); *Buchanan v. Warley*, 245 U.S. 60, 81 (1917). It cannot then be an acceptable justification for preserving the wall of separation by closing the facility involved. Similarly, financial expense is insufficient justification for keeping the races apart by continuing segregation. "[V]indication of conceded constitutional rights cannot be made dependent upon any theory that it

⁶Legitimized by the *Dred Scott* axiom that black people were "altogether unfit to associate with the white race," 19 How. at 407, the struggle gained impetus from the Black Codes of the post-Civil War era and from the "separate-but-equal" doctrine of *Plessy*. The sixteen years since *Brown* have seen a frantic effort by racial separatists to stay one step ahead of the Wartime Amendments. See e.g., 2 Emerson, Haber and Dorsen, *Political and Civil Rights in the United States* (Third Ed.) 1630-65; *Jones v. Alfred H. Meyer Co.*, 392 U.S. 409, 448, fn. 5 (1968) (concurring opinion of Mr. Justice Douglas). In light of *Burton v. Wilmington Parking Authority*, *supra*, *Evans v. Newton*, 382 U.S. 296 (1966), *Reitman v. Mulkey*, 387 U.S. 369 (1967) and *Jones v. Alfred H. Meyer Co.*, *supra*, closing a facility now appears to be the only remaining way of avoiding integration.

is less expensive to deny than to afford them." *Watson v. City of Memphis*, 373 U.S. at 537. Financial expense must therefore be insufficient excuse for keeping the races apart by closing the facility. As in *Watson*, this Court should "not assume that the citizens . . . accept the questionable premise implicit in this argument or that either the resources of the city are inadequate, or its government unresponsive, to the needs of all its citizens." 373 U.S. at 537-8. Therefore, because consideration of race furthers no constitutionally acceptable purpose, but serves instead to stigmatize black people with a badge of inferiority, closing Jackson's pools solely to avoid integration is a denial of equal protection.

All this is particularly apt where, historically, the State of Mississippi, the City of Jackson and Mayor Thompson, in particular, have fomented and encouraged the race prejudice that respondents now see as justification for the closing. The role of the State of Mississippi need not be discussed at length. It is sufficient to point to its "steel-hard, inflexible, undeviating official policy of segregation," *United States v. City of Jackson*, 318 F.2d 1 (C.A.5, 1963) exemplified by its segregation laws,⁷ particularly Section 4065.3 of the Mississippi Code, which required Mayor Thompson to prevent integration of Jackson's pools. As for the City, it was a Jackson ordinance requiring segregation of public swimming pools that lead to the *Clark v. Thompson* lawsuit. And Mayor Thompson has, over and over again, encouraged race prejudice and segregation in Jackson. See, e.g., *Strother v. Thompson*, 372 F. 2d 654 (C.A.5, 1967); *Guyot v. Pierce*, 372 F.2d 658 (C.A.5, 1967); *NAACP v. Thompson*, 357 F.2d 831

⁷ See *Adickes v. S. H. Kress & Co.*, 398 U.S. ___, 90 S.Ct. 1598, 1623-25 (1970) (Opinion of Mr. Justice Brennan).

(C.A.5, 1966); *United States v. City of Jackson*, *supra*; *Bailey v. Patterson*, 199 F.Supp. 595 (S.D.Miss., 1961), *vacated and remanded* 369 U.S. 31 (1962). See also Mayor Thompson's statements about the swimming pools quoted in Exhibit B of the affidavit of Carolyn Stevens, a petitioner here. Governmental encouragement of racial bigotry is, of course most unfortunate. As Mr. Justice Brandeis observed in another context, in a now famous dissent: "Our government is the potent, the omnipresent, teacher. For good or for ill, it teaches the whole people by its example." *Olmstead v. United States*, 277 U.S. 438, 485 (1928). Here, Mississippi the City of Jackson and Mayor Thompson have taught the citizens of Jackson only racial mistrust and prejudice. Having done so, they cannot be heard to complain if their teachings are reflected in the attitudes of the people. *Cooper v. Aaron*, 358 U.S. 1, 15. And See the concurring opinion of Mr. Justice Frankfurter. 358 U.S. at 19-23.

In reviewing the decision of the Court of Appeals, it is worth recalling the words of the first Mr. Justice Harlan: what he said in *Plessy v. Ferguson* proved to be prophetic. His words are applicable to the decision below in this cause:

In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in *Dred Scott*.

. . .

If evils will result from the commingling of the two races upon public highways established for the benefit of all, they will be infinitely less than those that will surely come from state legislation regulating the enjoyment of civil rights upon the basis of race. We boast of the freedom en-

joyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow-citizens, our equals before the law. The thin disguise of "equal" accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done. (163 U.S. at 559, 562.)

II. CLOSING A PUBLIC POOL SOLELY TO PREVENT BLACK CITIZENS FROM COMMINGLING WITH WHITE IS A BADGE OF SLAVERY PROHIBITED BY THE THIRTEENTH AMENDMENT.

Section I of the Thirteenth Amendment provides:

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted shall exist within the United States, or any place subject to their jurisdiction.

The scope and meaning of this section have received little judicial or academic study in recent years. This inattention has allowed its thrust to become obscured with the passage of time. "This amendment, as well as the Fourteenth, is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstance." *Civil Rights Cases*, 109 U.S. 3, 20 (1883).

To what circumstances was the amendment intended to apply? We first note that it is an affirmative grant of national power, "for the amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involun-

tary servitude shall not exist in any part of the United States." *Id.*, at 20. The amendment is therefore distinguished from the Fourteenth. Whereas the latter has been interpreted as making national power secondary or corrective, federal power under the Thirteenth is direct and primary. The amendment did not merely secure rights by way of prohibition; it affirmatively created the right of the black man in America to be free.⁸

The relevant Congressional debates and opinions of this Court show that rather than mere release from physical bondage, the Thirteenth Amendment was intended to achieve a revolution in federalism; it was a "charter of liberty,"⁹ prohibiting all badges of human slavery as well as the formal institution itself. It was a broad grant of national power freeing the black man from his white master but also from all the incidents of their former relationship.¹⁰

There were three Congressional debates on the amendment. The first, in the spring of 1864, and the second, a year later, occurred before its passage. The third debate took place in December, 1865 and the spring of 1866, after ratification of the amendment.

In the first two debates proponents and opponents of the amendment agreed that it would do more than simply abolish the formal institution of slavery. Fernando Wood of New York, a leading opponent, conceded it was designed to achieve "a revolution in social . . . rights."¹¹

⁸ See Kinoy, "The Constitutional Right of Negro Freedom," 21 Rutgers L. Rev. , 387 (1967).

⁹ *Congressional Globe*, 39th Cong., 1st Sess., 1151 (1866).

¹⁰ See J. tenBroek, *The Antislavery Origins of the Fourteenth Amendment* (University of California Press, 1951), pp. 137-152.

¹¹ *Cong. Globe*, 38th Cong., 1st Sess., 2941 (1864).

¹² *Id.*, at 2983.

¹³ *Id.*, 2d Sess., 177, 179-80, 216 (1865).

Robert Mallory of Kentucky noted: "You propose to leave them [the emancipated blacks] where they are freed, *and protect them in their right to remain there.*" (Emphasis added.)¹² Opponents acknowledged that the Thirteenth Amendment would not merely eliminate slavery but would make black people the equals of white, as a matter of law.¹³ The past one hundred years have proven conclusively that mere manumission would not achieve that equality; more, then, must have been intended by the amendment.

Abolitionists and their supporters saw the amendment not merely as partial fulfillment of their aims, but as the full, meaningful consummation of their struggle. James F. Wilson of Iowa, co-author of the amendment, opened the debate in the House of Representatives. He noted that the purpose of the amendment was to "stamp universal freedom on our national Constitution."¹⁴ After speaking of the constitutional rights which slavery had disregarded and practically destroyed for black people, Wilson said: "It is quite time, Sir, for the people of the free states to look these facts squarely in the face and provide a remedy which shall make the future safe for the rights of each and every citizen."¹⁵

E. C. Ingersoll of Illinois agreed that the amendment accomplished more than abolition of the formal institution of human slavery. He argued that it meant

freedom of speech, . . . the right to proclaim the eternal principles of liberty, truth and justice in Mobile, Savannah, or Charleston with the same freedom and security as . . . at the foot of Bunker Hill Monument. . . . [It] will secure

¹⁴ *Id.*, 1st Sess., 1200.

¹⁵ *Id.*, at 1202-3.

to the oppressed slave his natural and God-given rights . . . a right to live, and live in a state of freedom . . . a right to breath the free air, and to enjoy God's free sunshine . . . a right to till the soil, to earn his bread by the sweat of his brow, and to enjoy the rewards of his own labor . . . A right to the endearments and enjoyment of family ties. . . . [It will mean] that the rights of mankind, without regard to color or race, are respected and protected. (*Cong. Globe*, 38th Cong., 1st Sess., 2990.)

William D. Kelley of Pennsylvania concluded that the amendment was designed to accomplish "the political and social elevation of Negroes to all the rights of white men." *Id.*, at 2987. Charles Sumner of Massachusetts, in supporting the Amendment, said:

Beyond my general desire to see an act of universal emancipation that shall at once and forever settle this great question . . . there are two other ideas which are ever present to my mind as a practical legislator: first, to strike at slavery wherever I can hit it; and secondly, to clean the statute-book of all existing supports of slavery, so that it may find nothing there to which it may cling for life. To do less than this at the present moment, when slavery is still menacing, would be an abandonment of duty.

. . . Too well I know the vitality of slavery with its infinite capacity of propagation, and how little slavery it takes to make a slave State with all the cruel pretensions of slavery. (*Cong. Globe*, 38th Cong., 1st Sess., 1482.)

The belief that the Thirteenth Amendment was a broad charter going far beyond the mere manumission of black

people was repeated throughout the debates.¹⁶ The clearest declaration of the meaning of the amendment was by Senator Harry Wilson of Massachusetts. After noting that slavery was the "prolific mother" of mistreatment of the black man, he asserted:

If this amendment shall be incorporated by the will of the nation into the Constitution of the United States, it will obliterate the last lingering vestiges of the slave system; its chattelizing, degrading and bloody codes; its dark, malignant barbarizing spirit; all it was and is, everything connected with it or pertaining to it. . . . (*Cong. Globe*, 38th Cong., 1st Sess., 1324.)

Here at once, in language clear and unmistakeable, is the full meaning of the Thirteenth Amendment.

The debates demonstrate a recognition by the Congress that manumission itself would not mean an end to the "cruel pretensions of slavery," that even after the formal institution had ended, onerous disabilities would still attend a black man's life. So the amendment was written in language by which its framers sought to insure practical freedom, rather than the "mere paper guarantee"¹⁷ of freedom.¹⁸ The Thirteenth Amendment freed the slaves;

¹⁶ See, e.g., *Cong. Globe*, 38th Cong., 2d Sess., for the remarks of Godlove S. Orth of Indiana, 142-3; John A. Kasson of Iowa, 193; Nathaniel B. Smithers of Delaware, 217; Id., 1st Sess., John B. Henderson of Missouri, 1465; Daniel Morris of New York, 2615; John F. Farnsworth of Illinois, 2979.

¹⁷ *Cong. Globe*, 39th Cong., 1st Sess., 1151.

¹⁸ As noted earlier, there was a third Congressional debate over the scope of the Thirteenth Amendment. Opponents, for the first time, argued that it had a narrow meaning. This was a marked departure from the sentiments they had expressed in the earlier debates. Crucial to an understanding of this change in attitude is the recognition that this third discussion occurred *after* passage of the amendment, during debate over the 1866 Civil Rights Act, 14 Stat. 27. Opponents of the bill saw only one chance of defeating it: they would try to show that it was not authorized by the Thirteenth Amendment. To do this however, they would be forced to repudiate the broad interpretation they had given the amendment only a year earlier. Thus, political considerations

it freed them not only from their individual masters but from the oppressions that were incidents of their bondage. See J. tenBroek, *The Anti-Slavery Origins of the Fourteenth Amendment*, pp. 148-9.

This conclusion is further supported by opinions of this Court and its individual Justices. *United States v. Rhodes*, 27 Fed. Cas. 785 (No. 16,151) (C.C.Ky., 1866), was the first case involving a construction of the amendment. Justice Swayne, as Circuit Justice, declared of the new guarantee:

The emancipation which it wrought was an act of great national grace, and was doubtless intended to reach further in its effects as to every one within its scope, than the consequences of a manumission by a private individual. (27 Fed. Cas. at 794.)

The amendment was also broadly construed by Chief Justice Chase in *In re Turner*, 24 Fed. Cas. 337 (No. 14,247) (C.C.Md., 1867), and by Mr. Justice Bradley in *United States v. Cruikshank*, 25 Fed. Cas. 707 (No. 14,897) (C.C.La., 1874), *aff'd.* 92 U.S. 542 (1876).¹⁹ See also *People v. Washington*, 36 Cal. 658, 665 (1869) where the Court noted that the first section of the amendment was "self-executing in the emancipation of the persons then held in slavery, and in providing for the inviolability of the personal liberty of all for the future." (Emphasis

explained the narrower interpretation by some during this debate. Supporters of the bill, in giving the amendment a broad sweep, were consistent with the earlier understanding of it. See J. tenBroek, *op. cit.*, pp. 156-180.

¹⁹ The specific issue in each of these circuit cases was the constitutionality of an Act of Congress. But in passing on that precise question, each court found it necessary to discuss the scope of the Thirteenth Amendment.

added.) But compare *People v. Brady*, 40 Cal. 198, 215-6 (1870).

In the *Slaughter-House Cases*, this Court observed that the amendment was a "simple declaration of the personal freedom of all the human race" whose "obvious purpose was to forbid all shades and conditions of African slavery." 16 Wall. 36, 69. Further, its purpose was

the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. (16 Wall. at 71.)

It was thus recognized, in the first case before the full Court involving the Thirteenth Amendment, that it was designed not only to confirm the Emancipation Proclamation but, also, to protect against any steps that would tend to re-establish slavery by singling out the black man as inferior.

In *Strauder v. West Virginia*, 100 U.S.303, 306 (1880) and in *Ex parte Virginia*, 100 U.S.339, 344-5 (1880), this Court affirmed that the purpose of both the Thirteenth and Fourteenth Amendments was to secure to black people equality of civil rights with all other persons.

In the majority opinion in the *Civil Rights Cases*, 109 U.S. 3 (1883), Mr. Justice Bradley, speaking of the Thirteenth Amendment, said:

By its own unaided force and effect it abolished slavery, and established universal freedom. (109 U.S. at 20.)

Mr. Justice Bradley then re-emphasized the point. The amendment, he observed, "may be regarded as nullifying all State laws which establish or uphold slavery." *Ibid.* But the amendment did not merely abolish human slavery; it went further: "[I]t was a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States." *Ibid.* Civil and political freedom is much more than manumission.

In dissent Mr. Justice Harlan disagreed (on the Thirteenth Amendment issue) *only* on the question of whether refusal to a person of accommodations in an inn, public conveyance, or place of public amusement constituted a badge of slavery. He was in full agreement with the majority on the fundamental meaning of the amendment. See 109 U.S. at 34-5.²⁰

In *Plessy v. Ferguson*, 163 U.S. 537 (1896), the Louisiana statute compelling segregation of the races in railroad cars was attacked as repugnant to the Thirteenth Amendment. The disagreement between the majority and the dissent was on the question of whether such segregation tended to re-establish slavery; *i.e.*, whether it constituted a badge of slavery. But both Mr. Justice Brown for the majority and Mr. Justice Harlan in dissent believed the amendment prohibited all badges and incidents

²⁰ In his later dissent in *Hodges v. United States*, 203 U.S. 1 (1906), Mr. Justice Harlan explained the majority opinion in the *Civil Rights Cases*, *supra*, and his agreement with it: "As we have seen, this court has held that the Thirteenth Amendment, by its own force, without the aid of legislation, not only conferred freedom upon every person (not legally held in custody for crime) within the jurisdiction of the United States, but the right and privilege of being free from the badges or incidents of slavery. . . . I stood with the court in the declaration that the Thirteenth Amendment not only established and decreed universal, civil and political freedom throughout this land, but abolished the incidents or badges of slavery. . . ." 203 U.S. at 35, 32. (Emphasis added.)

of slavery. Mr. Justice Harlan reiterated the views expressed in the *Civil Rights Cases*, *supra*:

The Thirteenth Amendment does not permit the withholding or the deprivation of any right necessarily inhering in freedom. It not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude. It decreed universal civil freedom in this country. This court has so adjudged. [*Plessy v. Ferguson*, 163 U.S. at 555 (dissenting opinion of Mr. Justice Harlan).]

In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441-3, fn. 78 (1968), this Court approved the statement of the first Mr. Justice Harlan (joined by Mr. Justice Day) in dissent in *Hodges v. United States* that the interpretation of the amendment by the majority there was "entirely too narrow and . . . hostile to the freedom established by the Supreme Law of the land." 203 U.S. 1, 37. This Court then declared:

The conclusion of the majority in *Hodges* rested upon a concept of congressional power under the Thirteenth Amendment irreconcilable with the position taken by every member of this Court in the *Civil Rights Cases* and incompatible with the history and purpose of the Amendment itself. Insofar as *Hodges* is inconsistent with our holding today it is hereby overruled. (392 U.S. at 442-3, fn. 78.)

We respectfully submit that an interpretation of Section 1 of the Amendment excluding from its coverage the in-

cidents and badges of slavery would also be hostile to the freedom that it was designed to create, irreconcilable with the opinions of this Court and incompatible with the history and purpose of the amendment itself. The debates and judicial analysis demonstrate that the amendment was intended as a broad grant of national power, forbidding slavery, but also forbidding its onerous incidents. The freedom which the amendment made the right of every black man was freedom from "everything connected with ... or pertaining to"²¹ slavery.

It follows that the closing of Jackson's swimming pools solely to preserve the separation of the races is prohibited by the amendment. As was demonstrated in POINT I, *supra*, the closings proceed upon the assumption that black people are "beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations." *Dred Scott v. Sandford*, 19 How. at 407. The theory of racial inferiority was the prop, the justification, for the entire institution of human slavery. Indeed, each was the support of the other. A municipal act which proceeds upon the theory is, therefore, a relic of the institution and, as such, prohibited by the Thirteenth Amendment.

It is not contended that the amendment itself reaches every act implying the inferiority of the black man. Purely private acts may be beyond its scope. See *Ferguson v. Gies*, 82 Mich. 358, 46 N.W. 718, 721 (1890). But the case at bar is not within that category. The action challenged was an act by public officials with respect to facilities

²¹ *Cong. Globe*, 38th Cong., 1st Sess., 1324.

owned and operated by the city and used by thousands of people. In *Jones v. Alfred H. Mayer Co.*, *supra*, the majority acknowledged that discrimination in the sale of private housing is a relic of slavery. See also the concurring opinions of Mr. Justice Douglas in *Jones*, 392 U.S. at 444-449, and in *Bell v. Maryland*, 378 U.S. 226, 246-249 (1964). If forced separation of the races is a substitute for the Black Codes which were, in turn, substitutes for slavery itself, it follows inexorably that the act here of closing public pools solely to preserve the wall of separation between the races is a relic of slavery. As such, it is forbidden by the Thirteenth Amendment.

CONCLUSION

For the reasons above, petitioners are entitled to a reversal of the decision below and to a prompt reopening of Jackson's swimming pools.

Respectfully submitted,

(Signed)

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CERTIFICATE OF SERVICE

I hereby certify that on this day of July, 1970, three copies of this Brief Amicus Curiae were mailed postage prepaid to E. W. Stennett, Esq., City Attorney, Jackson, Mississippi, and Thomas H. Watkins, Esq., Suite 800, Bankers Trust Plaza Building, Jackson, Mississippi, Counsel for the Respondent and to Paul A. Rosen, Esq., 3200 Cadillac Tower, Detroit, Michigan 48226, Counsel for Petitioner. I further certify that all parties required to be served have been served.

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 107

HAZEL PALMER, ET AL., PETITIONERS

v.

ALLEN C. THOMPSON, MAYOR, CITY OF JACKSON, ET. AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinions of the court of appeals on rehearing *en banc* (A 44-73) are reported at 419 F. 2d 1222. The opinion of the three-judge panel (A 34-43) is reported at 391 F. 2d 324. The letter opinion, findings of fact and conclusions of law of the district court (A 23-31) are not reported.

JURISDICTION

The judgment of the court of appeals *en banc* (A 74) was entered on October 9, 1969. The petition for a writ of certiorari was filed on March 7, 1970, and was granted on April 20, 1970. 397 U.S. 1035. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a municipality's closure of all of its public swimming facilities, in order to avoid their racial desegregation, is prohibited by the Fourteenth Amendment.

INTEREST OF THE UNITED STATES

The United States has a continuing obligation under Title III of the Civil Rights Act of 1964, 42 U.S.C. 2000b, and under the Fourteenth Amendment, to protect individuals against denial of equal use of state-owned or state-operated public facilities on account of race or color. This Court's decision in this case is likely to affect the government's responsibilities and the success of its efforts in this area.

STATEMENT

Prior to commencement of this action, the City of Jackson, Mississippi, operated five public swimming pools. Four of them were maintained for the exclusive use of whites, and the fifth was maintained exclusively for the use of Negroes (A 8-10). The four white pools were located in municipal parks with a combined area of approximately 555 acres (A 8-10). The sole Negro pool was located in a park for Negroes comprising 33 acres (A 9). Additional facilities, including auditoriums (A 9) and golf courses (A 10), were also maintained by the city on a racially segregated basis.

In 1962, three Negro plaintiffs initiated a class action in the United States District Court for the Southern District of Mississippi, seeking to enjoin

city officials from enforcing state statutes requiring racial segregation in public recreational facilities. The district court held that the suit was not a proper class action and limited relief to a declaratory judgment in favor of plaintiffs' personal claims of right to unsegregated use of the city's public recreational facilities. *Clark v. Thompson*, 206 F. Supp. 539 (S.D. Miss.), affirmed *per curiam*, 313 F. 2d 637 (C.A. 5), certiorari denied, 375 U.S. 951. In response to that decision, the city closed all municipal swimming pools, an action which the mayor much later explained in the following manner (A 21) :

Realizing that the personal safety of all of the citizens of the City and the maintenance of law and order would prohibit the operation of swimming pools on an integrated basis, and realizing that the said pools could not be operated economically on an integrated basis, the City made the decision subsequent to the Clark case to close all pools owned and operated by the City to members of both races. The City thereby decided not to offer that type of recreational facility to any of its citizens, and it has not done so and does not intend to reopen any of said pools.

In August 1965, the present action was commenced against the mayor and other city officials, seeking a temporary restraining order.¹ The district court denied relief (A 31) on September 15, 1965, and, on March 26, 1966, the court entered a final judgment dismissing

¹ Questions regarding alleged racial discrimination with respect to the use of other public facilities were raised below but were not presented to this Court.

petitioners' complaint with prejudice (A 33). That judgment was affirmed by a panel of the court of appeals on August 29, 1967 (A 34); on October 9, 1969, on rehearing *en banc*, it was again affirmed (A 44), six judges dissenting (A 56).

SUMMARY OF ARGUMENT

This Court has recognized that, even though equally applicable to all persons regardless of race, state action which authorizes or invites racial discrimination, or, alternatively, which has as its purpose or effect racial segregation, may constitute a denial of equal protection of the laws. Both situations exist in the present case. The city's closing of the pools in response to the integration order and its explanation that interracial swimming cannot be safely or economically permitted imply to private owners in the vicinity that their swimming pools should be operated on a racially discriminatory basis. Moreover, the clear purpose and effect of the municipality's action, coming on the heels of the court order, is to prevent comingling of the races at these public facilities, thereby depriving the city's citizens of an opportunity to be accepted without regard to race in the use of municipal swimming pools. Thus, the citizens of the City of Jackson are no less segregated now than when dual facilities were maintained.

The justification proffered by the city for its action is constitutionally inadequate. Official predictions of physical violence likely to result if the swimming pools are integrated are no more than personal speculations. Nor is there anything in the record to sup-

port the assertion that compliance with the integration order would be uneconomical. While considerations of safety and economy may well sustain the temporary closing of some facilities to ensure prompt, orderly achievement of desegregation, no such showing has been, or indeed can be, made in the present case. There simply is no overriding state interest to justify the complete closure of all municipal swimming facilities in order to avoid their desegregation—which constituted state action impermissibly based on race.

ARGUMENT

1. The closing of public recreational facilities is undeniably state action; in the present case, the focus is on a decision made and implemented by municipal officials to close swimming pools that were owned or leased by the City of Jackson, Mississippi, and city-operated. The action of the municipality was essentially a negative one—*i.e.*, ceasing to provide a benefit which it had traditionally provided for its citizens. Thus, there is posed at the outset the question whether such action may be immune *per se* from constitutional scrutiny. Is a state, regardless of circumstance, always free to withdraw from an activity it has traditionally undertaken so long as there exists no constitutional obligation initially to undertake that activity or provide the particular service or benefit? This Court's decisions clearly indicate that it is not.

For example, in *Griffin v. County School Board*, 377 U.S. 218, this Court reviewed a decision by a political subdivision of the state to close all public

schools within its jurisdiction. In the circumstances of that state action—including the availability to white students of state-assisted private schools and the unavailability of such schools to black students (*id.* at 230, 232), the furnishing of public schools to students in all other counties of the state (*id.* at 225), and the overriding purpose of the county officials to avoid court-ordered desegregation (*id.* at 231, 232)—closing the county's public schools, even though that act was, as here, a negative one, was held to violate the Fourteenth Amendment. Thus, the county was not permitted to withdraw completely from affording public education to its citizens (*id.* at 225, 232), nor was the state allowed to sanction efforts by the county to do so (*id.* at 229).

Similarly, in *Reitman v. Mulkey*, 387 U.S. 369, the state's effective repeal, by constitutional amendment adopted in a popular referendum, of legislation prohibiting racial discrimination in housing was held by this Court to violate the Fourteenth Amendment in the circumstances of that case (namely, that the amendment "was intended to authorize, and does authorize, racial discrimination in the housing market," *id.* at 381)—notwithstanding that the state was never constitutionally required to enact such legislation (*id.* at 376). And see, *e.g.*, *Green v. County School Board*, 391 U.S. 430; *Garrity v. New Jersey*, 385 U.S. 493; *Slochower v. Board of Higher Education*, 350 U.S. 551, 559; *Keyes v. School District No. 1, Denver*, 313 F. Supp. 61 (D. Colo.).

It follows, as the court below unanimously held, that the city's closure of public recreational facilities in this case may properly be subjected to constitutional scrutiny under the equal protection clause of the Fourteenth Amendment.²

2. We turn, then, to the central issue in this litigation—whether the city's refusal to provide integrated public swimming facilities is racially discriminatory. Respondents insist that this Court need look no fur-

²The closing of public facilities is not an uncommon response to a duty to discontinue racially dual systems. Three *amici* in this case were plaintiffs in separate lawsuits initiated to desegregate public swimming pools in Greenwood, Canton, and Edwards, Mississippi; a fourth *amicus* is the mother of a boy who sought to integrate a swimming pool in West Point, Mississippi. In each instance, the facilities were closed. The opinions of the court below (A 72 n. 14, n. 2, 73) indicate that the Montgomery, Alabama, city parks were shut down to avoid integration in 1959; although they were reopened in 1965, "visitors to Montgomery's parks will find no animals in the City Zoo and no water in the public swimming pools" (App. 73). See *City of Montgomery, Ala. v. Gilmore*, 277 F. 2d 364 (C.A. 5). See, also, *Clark v. Flory*, 237 F. 2d 597 (C.A. 4) (park closed by state statute); *Tonkins v. City of Greensboro, N.C.*, 276 F. 2d 890 (C.A. 4) (*per curiam*) (municipal swimming pool closure). In response to a lawsuit seeking a freedom of choice school desegregation plan, the Commission Council of Plaquemines Parish, Louisiana, stopped financing the public school system; building programs were stopped; facilities were closed; public school property was allowed to be transferred to private, segregated schools; educational programs that had traditionally been offered only to white students were discontinued and denied to all. See *Plaquemines Parish Commission Council v. United States*, 415 F. 2d 817 (C.A. 5). See, also, *Griffin v. County School Board, supra*; *Hall v. St. Helena Parish School Board*, 197 F. Supp. 649 (E.D. La.), affirmed, 368 U.S. 515 (*per curiam*). Cf. *Evans v. Abney*, 396 U.S. 435.

ther than the act itself, that the closing of all five swimming pools treats whites and Negroes alike, prohibiting the use of municipal facilities to all persons regardless of race. This Court has, however, explicitly recognized that state action having an appearance of racial neutrality or racially equal application can nevertheless be invidiously discriminatory (a) where the state action invites or authorizes private discrimination, or (b) where the state action has the purpose or effect of producing racial segregation. Both of these factors appear to be present in this case.

A. Where state action, though racially neutral, authorizes, invites or encourages racial discrimination by private individuals, it may constitute a denial of equal protection of the laws. Thus, in *Anderson v. Martin*, 375 U.S. 399, the state required designation in state and local elections of every candidate's race on the ballots. This Court found unpersuasive the state's contention "that its Act is nondiscriminatory because the labeling provision applies equally to Negro and white" (375 U.S. at 403-404), so that racially motivated voting, if indeed it occurred, might work to the detriment of white as well as Negro candidates (*id.* at 402):

In the abstract, Louisiana imposes no restriction upon anyone's candidacy nor upon an elector's choice in the casting of his ballot. But by placing a racial label on a candidate at the most crucial stage in the electoral process—the instant before the vote is cast—the State furnishes a vehicle by which racial prejudice may be so aroused as to operate against one group

because of race and for another. This is true because by directing the citizen's attention to the single consideration of race or color, the State indicates that a candidate's race or color is an important—perhaps paramount—consideration in the citizen's choice, which may decisively influence the citizen to cast his ballot along racial lines.

And in *Reitman v. Mulkey*, 387 U.S. 369, the Court considered a permissive state constitutional provision conferring absolute discretion on owners of real property to convey, or decline to convey, their property; the provision replaced an open-housing statute. It was held that the constitutional provision constituted "an authorization to discriminate" (*id.* at 379) and therefore violated the equal protection clause. In essence, as the Court there observed, "[t]he right to discriminate, including the right to discriminate on racial grounds, was * * * embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government." *Id.* at 377. See, also, *Lombard v. Louisiana*, 373 U.S. 267; *Robinson v. Florida*, 378 U.S. 153.

Similar authorization and encouragement of discrimination is implicit in the instant case. The record clearly reflects that, but for the city's inability to continue to operate its public facilities on a racially segregated basis, the city swimming pools would not have been closed. The district court found (A 28) that the city's closing of all municipal pools was in response to a declaratory judgment prohibiting con-

tinued racial segregation. See *Clark v. Thompson*, 206 F. Supp. 539 (S.D. Miss.), affirmed *per curiam*, 313 F. 2d 637 (C.A. 5), certiorari denied, 375 U.S. 951. The city's Director of the Department of Parks and Recreation averred that "after the decision of the Court in the case of *Clark v. Thompson*, it became apparent that the swimming pools owned and operated by the City of Jackson could not be operated peacefully, safely, or economically on an integrated basis * * *" (A 18). In an affidavit filed in the district court, the mayor of the city also stated (A 21) that the swimming facilities could not be operated "on an integrated basis" (A 21), for two reasons:

[T]he personal safety of all of the citizens of the City and the maintenance of law and order would prohibit the operation of swimming pools on an integrated basis, and * * * the said pools could not be operated economically on an integrated basis. * * *

While nothing in the action actually taken, or in the municipality's reasons therefor, explicitly requires private discrimination, the official message here seems comparably clear to those involved in the *Anderson*, *Reitman*, *Lombard*, and *Robinson* cases—interracial swimming cannot be safely or economically permitted. Insofar as privately owned swimming pools may be operated in the city as public accommodations, as private clubs, or simply for the personal use of the owner and his guests, operating them on a racially discriminatory basis would seem to have been advised by the city—advised with an even greater

emphasis than had been inherent in the city's previous example of operating its pools on a segregated basis.³ For the city's admonition that swimming pools cannot be made available for use except on a racially segregated basis without endangering the safety of the users or the economic basis of the operation extends equally to them. In short, "[t]hose practicing racial discriminations need no longer rely solely on their personal choice." *Reitman v. Mulkey*, 387 U.S. at 377.⁴ See, also, *Bates v. City of Little Rock*, 361 U.S. 516, 524; *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 463.

Indeed, "[o]ne pool formerly leased by the City has subsequently been operated by the local Y.M.C.A. on a white-only basis" (A 52 n. 12; see *id.* at 5), though the causal connection between that private discrimination and the city's stand against interracial swimming is unclear from the record. Nor does the record reflect the extent to which private pool-owners (other than the YMCA) have in fact discriminated on a racial basis in response to the city's action. This, however, is in-

³ We note that in the past municipal officials have, with respect to these and other facilities available to the public, invited voluntary racial segregation. *Clark v. Thompson*, 206 F. Supp. 539, 541 (S.D. Miss.) (recreational facilities); *United States v. City of Jackson*, 206 F. Supp. 45, 47 (S.D. Miss.), reversed, 318 F. 2d 1, 5 (C.A. 5) (common carrier terminals); see *Bailey v. Patterson*, 199 F. Supp. 595, 611 (S.D. Miss.), vacated, 369 U.S. 31.

⁴ It is, of course, long settled that the equal protection clause forbids official action which injures the Negro by implying his unfitness or inferiority as a class, thereby encouraging private racial prejudice. See *Strauder v. West Virginia*, 100 U.S. 303, 308; *Brown v. Board of Education*, 347 U.S. 483, 494.

consequential; if the city's action constitutes an invitation or authorization to discriminate, no instance or pattern or practice of private discrimination and no causal connection between such discrimination and the official action need be shown. The record in *Anderson*, for example, contained no evidence that any voter had voted on a racial basis, and there was no showing in *Reitman* of a cause-in-fact relationship between the provable acts of private discrimination (which occurred prior to adoption of the constitutional amendment) and the state action.

B. The city's action is also discriminatory in another way. Where a city traditionally maintains facilities upon which its citizens reasonably rely for enjoyment of ordinary amenities of life, to close those facilities rather than integrate them effectively deprives the citizens of an opportunity to commingle with others and thus, to the extent that the closed facilities would otherwise have promoted such commingling, erects a positive barrier to racial integration.

This Court has emphatically held that the Fourteenth Amendment prohibits a state from preventing or deterring on a racial basis the free, interracial association of individuals—even if it does so by means of a law which applies equally to those of all races. *Loving v. Virginia*, 388 U.S. 1. The closing of the city's segregated swimming pools in the present case, concededly in order to avoid their integration, constitutes state action premised on no less a racial classification than was involved in the anti-miscegenation law held unconstitutional in *Loving*. Indeed, the pe-

culiar timing and all-inclusiveness of the decision to close the pools is reminiscent of the "uncouth twenty-eight-sided figure" utilized in *Gomillion v. Lightfoot*, 364 U.S. 339, 340, as a barrier to racial integration. See *id.* at 349 (Mr. Justice Whittaker, concurring).

Also instructive here is this Court's decision in *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, in which the state had placed restrictions upon students to prevent their interracial association while participating in activities of the state university. The issue in *McLaurin* was whether a Negro student had been denied equal protection of the laws where he was set apart from white students by reserving for him special classroom, cafeteria, and library seats. The Court held that the state could not constitutionally prevent students' intellectual commingling nor deny students the opportunity to be accepted on a nonracial basis (339 U.S. at 641-642):

It may be argued that appellant will be in no better position when these restrictions are removed, for he may still be set apart by his fellow students. This we think irrelevant. There is a vast difference—a Constitutional difference—between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar. *Shelley v. Kraemer*, 334 U.S. 1, 13-14 (1948). The removal of the state restrictions will not necessarily abate individual and group predilections, prejudices and choices. But at the very least, the state will not be depriving appellant of the opportunity to secure acceptance by his fellow students on his own merits.

In the instant case, the city comparably deprived its citizens of the opportunity to be accepted without regard to race in the use of municipal swimming facilities;⁵ the citizens are no less segregated now than when dual facilities were maintained.

Moreover, to the extent that the municipality had voluntarily undertaken to provide swimming facilities for its citizens, making it unnecessary for the private sector to develop equally adequate facilities,⁶ the closing of the pools has insured that racial segregation will be perpetuated. The constitutional harm is not merely that the city declined to provide an opportunity for racial integration; having invited reliance by the citizenry on the municipality for recreation, the city has erected a barrier to integration by closing facilities it had long maintained when they could no longer be operated on a segregated basis.⁷

⁵ While *McLaurin* did emphasize the educational disadvantages of segregated education and a correlative impediment to fulfilling society's need for trained leaders, 339 U.S. 641, the educational context of *McLaurin* would not seem to distinguish it from the recreational context of this case. Compare *Brown v. Board of Education*, 347 U.S. 483, 493, with *Mayor & City Council of Baltimore v. Dawson*, 350 U.S. 877.

⁶ That voluntarily undertaking to provide a service for another should produce a special relationship with special duties is no novel legal doctrine. For example, although not initially obligated to provide medical care, having undertaken to do so, a physician may not abandon his patient. *E.g.*, *Andrews v. Coulter*, 163 Wash. 429, 433, 1 P. 2d 320, 321. See, also, Restatement, Second, *Torts* § 324 (voluntary rescue), § 323 (undertaking to perform general services), § 362 (landlord's gratuitous repairs).

⁷ The record suggests that closure of the public facilities in this case, as in *Griffin v. County School Board*, 377 U.S. 218,

In the circumstances of this case, the removal of public facilities from public use does not itself constitute the full extent to which segregation will be perpetuated. The city has also invited private discrimination, as earlier indicated, and has admonished its citizens of the dangers of interracial swimming. Thus, insofar as the city's policy is adopted by the private sector, the lines of racial segregation will be drawn more sharply.

Finally, while it is impossible to measure the degree to which the municipal action may deter others from asserting their constitutional right not to be segregated by race in the use of public facilities, that potential is clearly presented by the facts of this case. For the Negro citizens of Jackson, Mississippi, have been presented a Hobson's choice—"the thing offered or nothing":⁸ Acquiesce in segregated facilities or lose those designated for your race. As Judge Wisdom, in dissent, described the predicament (A 71-72):

230, bears more heavily on Negroes than on whites inasmuch as a private organization has assumed operation of one of the swimming pools, apparently making it available to all members of the public who are white, while the record does not suggest that such a facility is available to Negroes (A 5-6, 28, 52 n. 12, 61-62). Like the private schools in *Griffin*, *id.* at 230, 231, 232, that facility might be said to be city-supported. See *Evans v. Newton*, 382 U.S. 296; *Pennsylvania v. Board of Directors*, 353 U.S. 230. Unlike *Griffin*, *id.* at 225, the record does not indicate the availability of swimming facilities in other areas of the state (A 51). But the final element of discrimination found in *Griffin*—perpetuation of racial segregation (*id.* at 231, 232)—is as clearly present here.

⁸ Webster's New Collegiate Dictionary 393 (2d ed.).

In Jackson the price of protest is high. Negroes there now know that they risk losing even segregated public facilities if they dare to protest segregation. Negroes will now think twice before protesting segregated public parks, segregated public libraries, or other segregated facilities. They must first decide whether they wish to risk living without the facility altogether, and at the same time engendering further animosity from a white community which has lost its public facilities also through the Negroes' attempt to desegregate these facilities.

This choice tends to perpetuate segregation by discouraging the assertion of constitutional rights; such discouragement is in itself constitutionally proscribed. See *Dombrowski v. Pfister*, 380 U.S. 479, 486-487; *Shapiro v. Thompson*, 394 U.S. 618, 631. Cf. *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263.

3. Ordinarily, a state need only show a rational relationship to a proper state purpose to justify its action under the equal protection clause. See, e.g., *Dandridge v. Williams*, 397 U.S. 471; *Walters v. St. Louis*, 347 U.S. 231, 237-238; *Kotch v. Board of River Port Pilot Commissioners*, 330 U.S. 552, 564. But "an exercise of the state police power which trenches upon the constitutionally protected freedom from invidious official discrimination based on race * * * bears a heavy burden of justification * * * and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy." *McLaughlin v. Florida*, 379 U.S. 184, 196; see *Loving v. Virginia*, 388 U.S. 1.

The justification proffered by the city for its action was that public swimming pools could not be operated safely or economically on an integrated basis (see *supra*, pp. 3, 9-10). This Court rejected essentially identical justifications for racial discrimination in residential areas (*Buchanan v. Warley*, 245 U.S. 60), public schools (*Cooper v. Aaron*, 358 U.S. 1; cf. (*Monroe v. Board of Commissioners*, 391 U.S. 450), and public recreational facilities (*Watson v. Memphis*, 373 U.S. 526). The conclusions of *Watson* are apposite here, and merit quoting at some length (373 U.S. at 535-537):

The city asserted in the court below, and states here, that its good faith in attempting to comply with the requirements of the Constitution is not in issue, and contends that gradual desegregation on a facility-by-facility basis is necessary to prevent interracial disturbances, violence, riots, and community confusion and turmoil. The compelling answer to this contention is that constitutional rights may not be denied simply because of hostility to their assertion or exercise. * * *

Beyond this, however, neither the asserted fears of violence and tumult nor the asserted inability to preserve the peace was demonstrated at trial to be anything more than personal speculations or vague disquietudes of city officials. There is no indication that there had been any violence or meaningful disturbances when other recreational facilities had been desegregated. In fact, the only evidence in the record was that such prior transitions had been peaceful. * * *

The other justifications for delay urged by the city or relied upon by the courts below are no more substantial, either legally or practically. It was, for example, asserted that immediate desegregation of playgrounds and parks would deprive a number of children—both Negro and white—of recreational facilities; this contention was apparently based on the premise that a number of such facilities would have to be closed because of the inadequacy of the “present” park budget to provide additional “supervision” assumed to be necessary to operate unsegregated playgrounds. As already noted, however, there is no warrant in this record for assuming that such added supervision would, in fact, be required, much less that police and recreation personnel would be unavailable to meet such needs if they should arise. More significantly, however, it is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them. * * * [Footnotes omitted.]

There is likewise no reason here to suppose that official predictions of the dangers of interracial swimming are more than “personal speculations.” Indeed, as in *Watson*, other public facilities in the city have been desegregated apparently without endangering public safety or the public fisc (see A 21). To be sure, conversion from a racially segregated to an integrated public facility may in some circumstances require

public officials to consider problems related to safety and economy. Even where such problems are not necessarily speculative (see *Cooper v. Aaron, supra*), this Court's decision in *Watson* seems to require at least that the solution be carefully tailored to the problem.

It might well be permissible in some circumstances for a municipality to close temporarily some facilities if the object is to ensure the prompt, orderly achievement of desegregation. The court below may be correct that the city "had considerable discretion as to how that transition could best be accomplished" (A 49); however, no such proper objective was sought here. In the words of the mayor, "[t]he City * * * decided not to offer that type of recreational facility to any of its citizens, and it has not done so and does not intend to reopen any of said pools" (A 21).

We accept, *arguendo*, "the absolute right" of the private citizen "at all times, to permanently close and go out of business * * * for whatever reason he may choose * * *," *Labor Board v. New Madrid Mfg. Co.*, 215 F. 2d 908, 914 (C.A. 8), cited in *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 271; see, also, *Evans v. Abney*, 396 U.S. 435. But the state has no such inherent right, and, accordingly, the city's action here cannot be justified on such a basis. For the reasons previously stated, it constitutes an invidious discrimination prohibited by the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, the decision of the court below should be reversed.

Respectfully submitted.

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DECEMBER 1970.

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DEC 4

F. ROBERT SEAV

IN THE
Supreme Court of the United States

OCTOBER TERM, 1970

—+—
No. 107
—+—

HAZEL PALMER, et al.,
Petitioners,

v.

ALLEN C. THOMPSON, Mayor, City of Jackson, et al.,
Respondents.

—+—
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—+—

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<i>Report of the National Advisory Commission on Civil Disorders</i> (Kerner Commission) (Bantam Books—1968)	4-5
<i>The Social and Economic Status of Negroes in the United States</i> , 1969, B/S Report No. 375 Current Population Report Series P. 23, No. 29 (U.S. Dept of Labor—U.S. Dept of Commerce)	2

IN THE
Supreme Court of the United States

OCTOBER TERM, 1970

No. 107

HAZEL PALMER, et al.,
Petitioners,

v.

ALLEN C. THOMPSON, Mayor, City of Jackson, et al.,
Respondents.

REPLY BRIEF FOR PETITIONERS

It is not the intent of this Reply Brief to analyze on a case by case basis the legal arguments of Respondents. Respondents have boldly restated the philosophy of cases long ago discredited by this Court. They have sought to limit the Thirteenth Amendment to its historical role of abolition of slavery, rather than to carry out its historical promise in proclaiming freedom for an enslaved race. They view the Fourteenth Amendment as directing the equality of physical treatment but permitting organized government to proclaim, by its actions, the universal inferiority of black people. And, lurking behind Respondents' arguments is the hope that this Court will return to the legalisms of "black inferiority" as developed in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856) and reaffirmed in *Plessy v. Ferguson*, 163 U.S. 537 (1896).

Fourteenth Amendment:

Respondents argue that to establish a denial of equal protection under the Fourteenth Amendment, it is necessary for Petitioners to prove two elements: (1) that the state's action resulted in difference of treatment between the whites and blacks, *and* (2) that this difference resulted from an intent to discriminate against blacks:

“Before there is a denial of equal protection of the laws under the Fourteenth Amendment, there must be (1) a difference in treatment of different citizens, *and* (2) a difference motivated by an intent and purpose to discriminate on account of race, i.e., an invidious discrimination. Before the second requirement comes into play, there must be a ‘difference’ or inequality, not present here. *Motive is therefore irrelevant.*” (Emphasis added.)

Respondents’ Brief, p. 24.

On the basis of this argument, Respondents contend that, because the closing of the pools does not result in difference of treatment between whites and blacks (neither race can use the pools), Petitioners have failed to prove the first element; therefore, they argue that the City’s “motive is irrelevant.”

Petitioners deny that the closing of the pools did not constitute a difference in treatment of blacks.¹ However,

¹ The assumption underlying Respondents’ argument i.e. that the closing of all public pools will then allow members of each race equal opportunity to obtain private pool facilities, is unreal. It assumes that blacks and whites possess the economic equality which alone can make private freedom of opportunity meaningful. The economic status of blacks, particularly in the South, is substantially lower than whites. In the South, the median income of a black family is only half that of a white family. *The Social and Economic Status of Negroes in the United States, 1969*, B/S Report No. 375—Current Population Reports Series P. 23, No. 29 (U.S. Dept. of Labor—U.S. Dept. of Commerce), p. VIII.

the contention that racially motivated state action can be constitutionally disregarded in the absence of a finding of discriminatory treatment, is in essence simply a euphemism for the rationale which underlies the "now thoroughly discredited doctrine of 'separate but equal'" (*Watson v. City of Memphis*, 373 U.S. 526, 538 (1963)): which rationale was stated by the *Plessy* majority to be:

"Laws permitting, and even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other" (at page 544).

Plessy held that, so long as public facilities were made available by the state to blacks and whites on an equal basis, the fact that the state's intent was to keep the races separate was irrelevant since no inference of inferiority could be drawn thereby. 'This parallels Respondents' argument here that, so long as both races have been equally deprived of the use of public pools, it is immaterial that the City of Jackson intended to prevent the use of public pools on an integrated basis. The majority's position in *Plessy* was answered by Justice Harlan in his dissent with this biting question:

"What can more certainly arouse race hate, what more can certainly create and perpetuate a feeling of distrust between these races, that state enactments which in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens?" (at p. 561).

And it is appropriate to paraphrase here: What can continue to arouse racial hate and distrust more than such actions as the Respondents' acknowledged intent to close its pools rather than permit blacks and white to swim to-

gether? If Justice Harlan's question can be said to be answered by Respondents' argument—that the intent is irrelevant so long as both races are equally banned—then the spirit of *Plessy* still lives.

But the *Plessy* assumptions and rationale were interred by *Brown v. School Board*, 347 U.S. 483 (1954), in language echoing Justice Harlan:

“To separate (black children) from others of similar age and qualifications solely because of their race generates feelings of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to ever be undone” (at p. 494).

Respondents also seek to justify their actions by the argument that integrating the pools would produce violence, and point to the recent racial conflict in this country to support this claim. Respondents, however, refuse to recognize that the only peace established during 100 years of segregation was that imposed upon blacks by the force and repression of the dominant white society; and that it is long-suffered repression, not freedom and equality, which inevitably leads to violent upheaval. With this Court's decision in *Brown*, the nation has taken the road to integration and equality, rather than segregation and repression, as the proper constitutional direction to ultimate racial peace. This historical truth that racism leads to violence was emphasized by the *Kerner Commission*:

“Despite these complexities, certain fundamental matters are clear. Of these, the most fundamental is the racial attitude and behavior of white Americans towards black Americans. Race prejudice has shaped our race history in the past; it now threatens to do so again. *White racism is essentially responsible for the explosive mixture which has been ac-*

cumulating in our cities since the end of World War II." (Emphasis added.)

Report of the National Advisory Commission on Civil Disorders, (Kerner Commission), "The Basic Causes", part II, Chapter 4 at 203 (Bantam Books—1968).

See also: *National Commission on the Causes and Prevention of Violence—To Establish Justice, to Ensure Domestic Tranquility*, (Eisenhower Commission), pps. XXI, 10, 15, 111-121, (Award Books—1969).

The integrating of public pools in Jackson will not end racial strife in Mississippi or elsewhere. But if the City of Jackson is successful in devising a legal technique for closing rather than integrating its pools, it will represent another indication that "our nation is moving towards two societies, one black, one white—separate and unequal." *Kerner Commission, supra*, at pg. 1.

Respondents raise a second point with respect to the applicability of the Fourteenth Amendment. In order to escape the otherwise clear implication of *Griffin v. County School Board*, 377 U.S. 218 (1964) which held that a county could not close its schools in order to avoid integration, they assert the proposition that, in relation to government, the operation of a public school is a "basic function" and carries out "a basic public responsibility" (Respondents' Brief, p. 37), whereas the operation of a swimming pool is only "the exercise of the discretionary proprietary power" (Respondents' Brief, p. 30). By virtue of this asserted distinction between basic function and proprietary power, Respondents draw the conclusion that "by a decision to no longer provide such facilities as swimming pools, no

one is deprived of any constitutional right" (Respondents' Brief, p. 37).

The majority opinion below makes a somewhat similar and equally nebulous distinction between an "essential" and non-essential "public function" (App. p. 38). But, significantly, no authority is cited either by Respondents or the majority opinion below to support this position. This distinction is reminiscent of a similar legal fiction which was developed in *Plessy*, namely a distinction between "legal" and "social" rights—a fiction which had the effect of molding race relations in this country into a pattern of segregation for almost 100 years.³

One needs very little foresight to visualize the morass which would be created if the distinction between essential and non-essential activities, determined whether black people are entitled to the protection of the Fourteenth Amendment.

For example, assuming that a school is "essential", are any of the following facilities or classes "non-essential"—gymnasium, auditorium, art, social studies? If a state kept its schools open, but closed all its included swimming pools or swimming classes to avoid integration, what would be the constitutional significance of its action?

³ The distinction between essential and non-essential rights is in the same category as the distinction between "privileges" and "rights" which long continued to plague and obscure the search for the application of constitutional principles until this Court's decisions in *Shapiro v. Thompson*, 394 U.S. 618, 627 f.n. 6 (1969) and *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

For a black child to be told that he cannot swim in a public pool with the same white friend with whom he attends public school because the former is non-essential while the latter is essential, can make little sense to him except as it makes clear to both that he is considered inferior.³

Thirteenth Amendment:

In keeping with the *Plessy* doctrine, Respondents assert that "the Thirteenth Amendment literally merely abolished the 'institution' of slavery" (Respondents' Brief, p. 13).⁴ However, the overriding purpose of the Thirteenth Amendment was to provide "universal freedom" for black people:

"No one can fail to be impressed with one pervading purpose found in all the amendments, laying at the foundation of each, and without which none of them would have been suggested; *we mean freedom of the slave race*, the security and firm establishment of that freedom and the protection of the newly-made freeman and citizen from oppression of those who formerly exercised unlimited dominion over them." (Emphasis added.)

Slaughter House Cases, 16 Wall. 36, 71 (83 U.S. XXI 394) 1872.

³ In *New Orleans City Park Improvement Association v. Detiege*, 252 F.2d 122 (5 C.C.A.—1958); aff'd 358 U.S. 54 (1958), the New Orleans City Park Improvement Association argued that a summary judgment requiring integration of park facilities was erroneously granted because the trial court had incorrectly acted, without taking evidence, on the assumption that the "psychological" effect of school segregation found to exist in *Brown*, also applied to segregated parks. The Court summarily rejected the argument.

⁴ This Court has rejected the argument, first expounded in *Hodges v. United States*, 203 U.S. 1 (1905) to the effect that the Thirteenth Amendment merely abolished slavery. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441, f.n. 78 (1968).

"The Thirteenth Amendment does not permit the withholding or the deprivation of any right necessarily inhering in freedom. It not only struck down the institution of slavery . . . but it prevents the imposition of any burdens of disabilities that constitute badges of slavery or servitude. *It decreed universal freedom in this country.*" (Emphasis added.)

Plessy v. Ferguson, at p. 555 (Harlan, dissenting).

To urge, as Respondents do, that this case merely involves the desire of a few people to swim in public pools, reflects the blurred perception of a white power structure yet unwilling to accept black peoples' status as free men. It is not the right to swim but the right to be free, and to be treated as free men, which is at issue in this case—a right which is not a mere "paper guarantee." *Jones, supra*, at 443.

But, if the right to be free has any meaning for black people, it must guarantee that black people have a right to integrated facilities, a right to unfettered access to courts for the purpose of obtaining integrated facilities, a right to have public pools re-opened when their closure occurred as a result of a court order integrating those facilities. Anything less is not freedom.

Respondents' Actions Violate Section 1981

Respondents argue that there is an absence of proof that they closed the public pools to punish black citizens for succeeding in their lawsuit to enjoin segregation of the pools. The facts of this case and the historical evidence demonstrate that Respondents' purpose has been to prevent blacks from achieving integration and to circumvent each legal victory with yet another scheme designed to frustrate and avoid each integration order.

However, even if the City of Jackson's intent was not to punish black people for their legal success in *Clark v.*

Thompson, 205 F. Supp. 359, aff'd. 313 F.2d 637 (1963), the closing of the pools in fact accomplished this purpose by denying them the use of any pool, solely because they successfully exercised their federal statutory right to seek relief in courts under the Civil Rights Act of 1970, 42 U.S.C. §1981.

Only recently, in *Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967), this Court invalidated an application of the Florida Unemployment Compensation law because it discouraged employees from seeking access to the National Labor Relations Board. The Florida law on its face did not hinder access, nor was there any showing that Florida intended to frustrate the federal policy of access to the Board. Nevertheless, this Court struck down the application of the law which denied unemployment benefits to those who filed unfair labor charges with the Board because its *effect* was to frustrate enforcement of a federal statute and was thus invalid under the Supremacy clause.

"The action of Florida here, like the coercive actions which employers and unions are forbidden to engage in has a direct tendency to frustrate the purpose of congress to leave people free to make charges of unfair labor practices to the Board" (at p. 239).

c.f. *Hill v. State of Florida*, 325 U.S. 538 (1945).

In the instant case, Section 1981 was adopted to give black people the right to vindicate their civil rights by bringing suits in courts of law. The Respondents are prohibited from acting so as to frustrate that right. Respondents, by closing their public pools, have, intentionally or not, taught blacks the lesson that if they go to court to vindicate their civil rights, they will end up with less than they had before. To permit the state to accomplish this object in this manner

would frustrate the effectiveness of Section 1981 in an area of race relations where Congress had clearly intended that the courts would provide legal protection.

CONCLUSION

The judgment below should be reversed and the district court directed to issue a permanent injunction requiring respondents or their successors in officer to operate the municipal swimming and wading facilities of the City of Jackson on an integrated basis.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 107.—OCTOBER TERM, 1970

Hazel Palmer et al., Petitioners,	} On Writ of Certiorari	
v.		to the United States
Allen C. Thompson, Mayor,		Court of Appeals for
City of Jackson, et al.	} the Fifth Circuit.	

[June 14, 1971]

MR. JUSTICE BLACK delivered the opinion of the Court.

In 1962 the city of Jackson, Mississippi, was maintaining five public parks along with swimming pools, golf links, and other facilities for use by the public on a racially segregated basis. Four of the swimming pools were used by whites only and one by Negroes only. Plaintiffs brought an action in the United States District Court seeking a declaratory judgment that this state-enforced segregation of the races was a violation of the Thirteenth and Fourteenth Amendments, and asking an injunction to forbid such practices. After hearings the district court entered a judgment declaring that enforced segregation denied equal protection of the laws but it declined to issue an injunction.¹ The Court of Appeals affirmed, and we denied certiorari.² The city proceeded to desegregate its public parks, auditoriums, golf course, and the city zoo. However, the city council decided not to try to operate the public swimming pools on a desegregated basis. Acting in its legislative capacity, the council surrendered its lease on one pool and closed four which it owned. A number of Negro citizens of Jackson then filed this suit to force the city to reopen the pools and

¹ *Clark v. Thompson*, 206 F. Supp. 539 (SD Miss. 1962).

² 313 F. 2d 637 (CA5 1963), cert. denied 375 U. S. 951 (1963).

operate them on a desegregated basis. The District Court found that the closing was justified to preserve peace and order and because the pools could not be operated economically on an integrated basis.³ It held the city's action did not deny black citizens equal protection of the laws. The Court of Appeals sitting *en banc* affirmed, six out of 13 judges dissenting.⁴ That court rejected the contention that since the pools had been closed either in whole or in part to avoid desegregation the city council's action was a denial of equal protection of the laws. We granted certiorari to decide that question. We affirm.

I

Petitioners rely chiefly on the first section of the Fourteenth Amendment which forbids any State to "deny to any person within its jurisdiction the equal protection of the laws." There can be no doubt that a major purpose of this Amendment was to safeguard Negroes against discriminatory state laws—state laws that fail to give Negroes protection equal to that afforded white people. History shows that the achievement of equality for Negroes was the urgent purpose not only for passage of the Fourteenth Amendment but for the Thirteenth and Fifteenth Amendments as well. See, *e. g.*, *Slaughterhouse Cases*, 16 Wall. 36, 71-72 (1872). Thus the Equal Protection Clause was principally designed to protect Negroes against discriminatory action by the States. Here there has unquestionably been "state action" because the official local government legislature, the city council, has closed the public swimming pools of Jackson. The question, however, is whether this closing of the pools is state action that denies "the equal protection of the laws" to Negroes. It should be noted first that neither the Four-

³ The Court's opinion is not officially reported.

⁴ 419 F. 2d 1222 (CA5 1969).

teenth Amendment nor any act of Congress purports to impose an affirmative duty on a State to begin to operate or to continue to operate swimming pools. Furthermore, this is not a case where whites are permitted to use public facilities while blacks are denied access. It is not a case where a city is maintaining different sets of facilities for blacks and whites and forcing the races to remain separate in recreational or educational activities.⁵ See, e. g., *Watson v. City of Memphis*, 373 U. S. 526 (1963); *Brown v. Board of Education*, 347 U. S. 483 (1954).

Unless, therefore, as petitioners urge, certain past cases require us to hold that closing the pools to all denied equal protection to Negroes, we must agree with the courts below and affirm.

II

Although petitioners cite a number of our previous cases, the only two which even plausibly support their argument are *Griffin v. County School Board of Prince Edward County*, 377 U. S. 218 (1964), and *Reitman v. Mulkey*, 387 U. S. 369 (1967). For the reasons that follow, however, neither case leads us to reverse the judgment here.⁶

⁵ My Brother WHITE's dissent suggests that the pool closing operates unequally on white and blacks because, "The action of the city in this case interposes a major deterrent to seeking judicial or executive help in eliminating racial restrictions on the use of public facilities." *Post*, at 39-31. It is difficult to see the force of this argument since Jackson has desegregated its public parks, auditoriums, golf courses, city zoo, and the record indicates it now maintains no segregated public facilities.

⁶ *Bush v. Orleans Parish School Board*, 187 F. Supp. 42 (ED La. 1960), *aff'd*, 365 U. S. 569 (1961), does not lead us to reverse the judgment here. In *Bush* we wrote no opinion but merely affirmed a lower federal court judgment that held unconstitutional certain laws designed to perpetuate segregation in the Louisiana public schools. One law held unconstitutional by the lower court empowered the State Governor to close any school ordered to integrate;

A. In *Griffin* the public schools of Prince Edward County, Virginia, were closed under authority of state and county law, and so-called "private schools" were set up in their place to avoid a court desegregation order. At the same time, public schools in other counties in Virginia remained open. In Prince Edward County the "private schools" were open to whites only and these schools were in fact run by a practical partnership between state and county, designed to preserve segregated education. We pointed out in *Griffin* the many facets of state involvement in the running of the "private schools." The State General Assembly had made available grants of \$150 per child to make the program possible. This was supplemented by a county grant program of \$100 per child and county property tax credits for citizens contributing to the "private schools." Under those circumstances we held that the closing of public schools in just one county while the State helped finance "private schools" was a scheme to perpetuate segregation in education which constituted a denial of equal protection of the laws. Thus the *Griffin* case simply treated the school program for what it was—an operation of Prince Edward County schools under a thinly disguised "private" school system actually planned and car-

another empowered him to close all state schools if one were integrated. Of course that case did not involve swimming pools but rather public schools, an enterprise we have described as "perhaps the most important function of state and local governments." *Brown v. Board of Education*, *supra*, at 493. More important, the laws struck down in *Bush* were part of an elaborate package of legislation through which Louisiana sought to maintain public education on a segregated basis, not to end public education. See also *Bush v. Orleans Parish School Board*, 189 F. Supp. 916 (ED La. 1960). Of course there was no serious problem of probing the motives of a legislature in *Bush* because most of the Louisiana statutes explicitly stated they were designed to forestall integrated schools. 187 F. Supp. 42, at 45.

ried out by the State and the county to maintain segregated education with public funds. That case can give no comfort to petitioners here. This record supports no intimation that Jackson has not completely and finally ceased running swimming pools for all time. Unlike Prince Edward County, Jackson has not pretended to close public pools only to run them under a "private" label. It is true that the Leavell Woods pool, previously leased by the city from the YMCA, is now run by that organization and appears to be open only to whites. And according to oral argument, another pool owned by the city before 1963 is now owned and operated by Jackson State College, a predominantly black institution, for college students and their guests.⁷ But unlike the "private schools" in Prince Edward County there is nothing here to show the city is directly or indirectly involved in the funding or operation of either pool.⁸ If the time ever comes when Jackson attempts to run segregated public pools either directly or indirectly, or participates in a subterfuge whereby pools are nominally run by "private parties" but actually by the city, relief will be available in the federal courts.

B. Petitioners also claim that Jackson's closing of the public pools authorizes or encourages private pool owners to discriminate on account of race and that such "encouragement" is prohibited by *Reitman v. Mulkey*, *supra*.

In *Reitman*, California had repealed two laws relating to racial discrimination in the sale of housing by passing a constitutional amendment establishing the right of

⁷ Transcript of Oral Argument 31-32.

⁸ There is no question before us here whether the black citizens of Jackson may be entitled to utilize the swimming facilities of Leavell Woods pool. Nothing on the present record indicates state involvement in the running of that pool. The YMCA, which apparently now operates the pool, was not joined as a party and thus of course no judgment could be entered against it.

private persons to discriminate on racial grounds in real estate transactions. This Court there accepted what it designated as the holding of the Supreme Court of California, namely that the constitutional amendment was an official authorization of racial discrimination which significantly involved the State in the discriminatory acts of private parties. 387 U. S., at 376-378, 380-381.

In the first place there are no findings here about any state "encouragement" of discrimination, and it is not clear that any such theory was ever considered by the District Court. The implication of petitioner's argument appears to be that the fact the city turned over to the YMCA a pool it had previously leased is sufficient to show automatically that the city has conspired with the YMCA to deprive Negroes of the opportunity to swim in integrated pools. Possibly in a case where the city and the YMCA were both parties, a court could find that the city engaged in a subterfuge, and that liability could be fastened on it as an active participant in a conspiracy with the YMCA. We need not speculate upon such a possibility, for there is no such finding here, and it does not appear from this record that there was evidence to support such a finding. *Reitman v. Mulkey* was based on a theory that the evidence was sufficient to show the State was abetting a refusal to rent an apartment on racial grounds. On this record, *Reitman* offers no more support to petitioners than does *Griffin*.

III

Petitioners have also argued that respondents' action violates the Equal Protection Clause because the decision to close the pools was motivated by a desire to avoid integration of the races. But no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted

for it. The pitfalls of such analysis were set forth clearly in the landmark opinion of Mr. Justice Marshall in *Fletcher v. Peck*, 6 Cranch 87, 130 (1810), where the Court declined to set aside the Georgia Legislature's sale of lands on the theory that its members were corruptly motivated in passing the bill.

A similar contention that illicit motivation should lead to a finding of unconstitutionality was advanced in *United States v. O'Brien*, 391 U. S. 367, 383 (1968), where this Court rejected the argument that a defendant could not be punished for burning his draft card because Congress had allegedly passed the statute to stifle dissent. That opinion explained well the hazards of declaring a law unconstitutional because of the motivations of its sponsors. First, it is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment. *Id.*, at 383, 384. Here, for example, petitioners have argued that the Jackson pools were closed because of ideological opposition to racial integration in swimming pools. Some evidence in the record appears to support this argument. On the other hand the courts below found that the pools were closed because the city council felt they could not be operated safely and economically on an integrated basis. There is substantial evidence in the record to support this conclusion. It is difficult or impossible for any court to determine the "sole" or "dominant" motivation behind the choices of a group of legislators. Furthermore, there is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters. If the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature or relevant governing body re-passed it for different reasons.

It is true there is language in some of our cases interpreting the Fourteenth and Fifteenth Amendments which may suggest that the motive or purpose behind a law is relevant to its constitutionality. *Griffin v. Prince Edward County, supra*; *Gomillion v. Lightfoot*, 304 U. S. 330, 347 (1930). But the focus in those cases was on the actual effect of the enactments, not upon the motivation which led the States to behave as they did. In *Griffin*, as discussed *supra*, the State was in fact perpetuating a segregated public school system by financing segregated "private" academies. And in *Gomillion* the Alabama Legislature's gerrymander of the boundaries of Tuskegee excluded virtually all Negroes from voting in town elections. Here the record indicates only that Jackson once ran segregated public swimming pools and that no public pools are now maintained by the city. Moreover, there is no evidence in this record to show that the city is now covertly aiding the maintenance and operation of pools which are private in name only. It shows no state action affecting blacks differently from whites.

Petitioners have argued strenuously that a city's possible motivations to ensure safety and save money cannot validate an otherwise impermissible state action. This proposition is of course true. Citizens may not be compelled to forgo their constitutional rights because officials fear public hostility or desire to save money. *Buchanan v. Warley*, 245 U. S. 60 (1917); *Cooper v. Aaron*, 358 U. S. 1 (1958); *Watson v. City of Memphis*, 373 U. S. 526 (1963). But the issue here is whether black citizens in Jackson are being denied their constitutional rights when the city has closed the public pools to black and white alike. Nothing in the history or the language of the Fourteenth Amendment nor in any of our prior cases persuades us that the closing of the Jackson swimming pools to all its citizens constitutes a denial of "the equal protection of the laws."

IV

Finally, some faint and unpersuasive argument has been made by petitioners that the closing of the pools violated the Thirteenth Amendment which freed the Negroes from slavery. The argument runs this way: The first Mr. Justice Harlan's dissent in *Plessy v. Ferguson*, 163 U. S. 537, 552 (1896), argued strongly that the purpose of the Thirteenth Amendment was not only to outlaw slavery but all of its "badges and incidents." This broad reading of the Amendment was affirmed in *Jones v. Alfred Mayer Co.*, 392 U. S. 409 (1968). The denial of the right of Negroes to swim in pools with white people is said to be a "badge or incident" of slavery. Consequently, the argument seems to run, this Court should declare that the city's closing of the pools to keep the two races from swimming together violates the Thirteenth Amendment. To reach that result from the Thirteenth Amendment would severely stretch its short simple words and do violence to its history. Establishing this Court's authority under the Thirteenth Amendment to declare new laws to govern the thousands of towns and cities of the country would grant it a law-making power far beyond the imaginations of the Amendment's authors. Finally, although the Thirteenth Amendment is a skimpy collection of words to allow this Court to legislate new laws to control the operation of swimming pools throughout the length and breadth of this Nation, the Amendment does contain other words that we held in *Jones v. Alfred Mayer Co.* could empower Congress to outlaw "badges of slavery." The last sentence of the Amendment reads:

"... Congress shall have power to enforce this Article by appropriate legislation."

But Congress has passed no law under this power to regulate a city's opening or closing of swimming pools or other recreational facilities.

It has not been so many years since it was first deemed proper and lawful for cities to tax their citizens to build and operate swimming pools for the public. Probably few persons, prior to this case, would have imagined that cities could be forced by five lifetime judges to construct or refurbish swimming pools which they choose not to operate for any reason, sound or unsound. Should citizens of Jackson or any other city be able to establish in court that public, tax-supported swimming pools are being denied to one group because of color and supplied to another, they will be entitled to relief. But that is not the case here.

The judgment is

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 107.—OCTOBER TERM, 1970

Hazel Palmer et al., Petitioner,	}	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
v.		
Allen C. Thompson, Mayor, City of Jackson, et al.		

[June 14, 1971]

MR. CHIEF JUSTICE BURGER, concurring.

I join the opinion of Mr. JUSTICE BLACK, but add a brief comment.

The elimination of any needed or useful public accommodation or service is surely undesirable and this is particularly so of public recreational facilities. Unfortunately the growing burdens and shrinking revenues of municipal and state governments may lead to more and more curtailment of desirable services. Inevitably every such constriction will affect some groups or segments of the community more than others. To find an Equal Protection issue in every closing of public swimming pools, tennis courts or golf courses would distort beyond reason the meaning of those important constitutional guarantees. To hold, as petitioner would have us do, that every public facility or service, once opened, constitutionally "locks in" the public sponsor so that they may not be dropped (see the footnote to Mr. JUSTICE BLACKMUN's concurring opinion, would plainly discourage the expansion and enlargement of needed services in the long run.

We are, of course, not dealing with the wisdom or desirability of public swimming pools; we are asked to hold on a very meagre record that the Constitution *requires* that public swimming pools, once opened, may

not be closed. But all that is good is not commanded by the Constitution and all that is bad is not forbidden by it. We would do a grave disservice, both to elected officials, and to the public, were we to require that every decision of local governments to terminate a desirable service be subjected to a microscopic scrutiny for forbidden motives rendering the decision unconstitutional.

SUPREME COURT OF THE UNITED STATES

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Allen C. Thompson, Mayor, City of Jackson, et al.		

[June 14, 1971]

MR. JUSTICE BLACKMUN, concurring.

I, too, join MR. JUSTICE BLACK's opinion and the judgment of the Court.

Cases such as this are "hard" cases for there is much to be said on each side. In isolation this litigation may not be of great importance; however, it may have significant implications.

The dissent of MR. JUSTICE WHITE rests on a conviction that the closing of the Jackson pools was racially motivated, at least in part, and that municipal action so motivated is not to be tolerated. That dissent builds to its conclusion with a detailed review of the city's and the State's official attitudes of past years.

MR. JUSTICE BLACK's opinion stresses, on the other hand, the facially equal effect upon all citizens of the decision to discontinue the pools. It also emphasizes the difficulty and undesirability of resting any constitutional decision upon what is claimed to be legislative motivation.

I remain impressed with the following factors: (1) No other municipal recreational facility in the city of Jackson has been discontinued. Indeed, every other service—parks, auditorium, golf courses, zoo—that once was segregated, has been continued and operates on a nonsegregated basis. One must concede that this was effectuated initially under pressure of the 1962 declaratory judgment of the federal court. (2) The pools are not part of the city's educational system. They are a general municipal service

of the nice-to-have but not essential variety, and they are a service, perhaps a luxury, not enjoyed by many communities. (3) The pools had operated at a deficit. It was the judgment of the city officials that these deficits would increase. (4) I cannot read into the closing of the pools an official expression of inferiority toward black citizens, as MR. JUSTICE WHITE and those who join him repetitively assert, *post*, pp. 2, 27, and 29, and certainly on this record I cannot perceive this to be a "fact" or anything other than speculation. Furthermore, the alleged deterrent to relief, said to exist because of the risk of losing other public facilities, *post*, pp. 30-31, is not detectable here in the face of the continued and desegregated presence of all other recreational facilities provided by the city of Jackson. (5) The response of petitioners' counsel at oral argument to my inquiry* whether the city was to be "locked in" with its pools for an indefinite time in the future, despite financial loss of

*"Q. Mr. Rosen, if you were to prevail here, would the city of Jackson be locked in to operating the pools irrespective of the economic consequences of that operation?

"A. If the question is forever. If it was purely an economic problem, having nothing to do with race, or opposition to integration, they could handle that problem the way any community handles that problem, if it is purely an economic decision. But if it becomes a consideration of race, which creates the economic difficulties, then it seems to me that this Court in numerous decisions has answered that question. It answered it in *Watson*, it answered it in *Brown*, and it answered it in *Green*.

"Q. Well, this is in the premise of my question, for you to prevail here, this racial overtone, I will assume, you must concede must be present. Now suppose you prevail, and suppose they lose economically year after year by increasing amounts. My question is, are they locked in forever?

"A. If the question is, are they locked in forever because of racial problems which cause a rise in economic difficulties in operating the pool, my answer is that they would be locked in." Transcript of Oral Argument, 43-44.

whatever amount, just because at one time the pools of Jackson had been segregated, is disturbing.

There are, of course, opposing considerations enumerated in the two dissenting opinions. As my Brothers BLACK, DOUGLAS, and WHITE all point out, however, the Court's past cases do not precisely control this one, and the present case, if reversed, would take us farther than any before. On balance, in the light of the factors I have listed above, my judgment is that this is neither the time nor the occasion to be punitive toward Jackson for her past constitutional sins of segregation. On the present as presented to us in this case, I therefore vote to affirm.

SUPREME COURT OF THE UNITED STATES

No. 107.—OCTOBER TERM, 1970

Hazel Palmer et al., Petitioners,	}	On Writ of Certiorari
v.		to the United States
Allen C. Thompson, Mayor, City of Jackson, et al.		Court of Appeals for the Fifth Circuit.

[June 14, 1971]

MR. JUSTICE DOUGLAS, dissenting.

Jackson, Mississippi closed all the swimming pools owned and operated by it, following a judgment of the Court of Appeals in *Clark v. Thompson*, 313 F. 2d 637, which affirmed the District Court's grant of a declaratory judgment that three Negroes were entitled to the desegregated use of the city's swimming pools. 206 F. Supp. 539, 542. No municipal swimming facilities have been opened to any citizen of either race since that time; and the city apparently does not intend to reopen the pools on an integrated basis.

That program is not, however, permissible if it denies rights created or protected by the Constitution. *Buchanan v. Warley*, 245 U. S. 60, 81. I think that the plan has that constitutional defect; and that is the burden of this dissent.

Hunter v. Erickson, 393 U. S. 385, *Reitman v. Mulkey*, 387 U. S. 369, and *Griffin v. County School Board*, 377 U. S. 218, do not precisely control the present case. They are different because there state action perpetuated ongoing regimes of racial discrimination in which the State was implicated.

In *Griffin*, the State closed public schools in one county only, not in the others, and meanwhile contributed to the support of private segregated white schools. 377 U. S., at 232. That, of course, was a continuation of segregation in another form. In *Hunter* a city passed a

housing law which provided that before an ordinance regulating the sale or lease of realty on the basis of race could become effective it must be approved by a majority vote. Thus the protection of minority interests became much more difficult.¹ We held that a state agency could not in its voting scheme so disadvantage Negro interests. In *Reitman* the State repealed legislation prohibiting racial discrimination in housing, thus encouraging racial discrimination in the housing market. 387 U. S., at 376.

Whether, in the closing of all municipal swimming pools in Jackson, Miss., any artifices and devices are employed as in *Burton v. Wilmington Parking Authority*, 365 U. S. 715, to make the appearance not conform to the reality is not shown by this record. Under *Burton*, if the State has a continuing connection with a swimming pool, it becomes a public facility and the State is under obligation to see that the operators meet all Fourteenth Amendment responsibilities. 365 U. S., at 725. We may not reverse under *Burton* because we do not know what the relevant facts are.

Closer in point is *Bush v. Orleans Parish School Bd.*, 187 F. Supp. 42, aff'd 365 U. S. 569. Louisiana, as part of her strategy to avoid a desegregated public school system, authorized the Governor to close any public school ordered to be integrated. The three-judge District Court relying on *Copper v. Aaron*, 358 U. S. 1, 17 held that the Act was unconstitutional and enjoined the Governor from enforcing it. The District Court decision was so clearly

¹*James v. Valtierra*, — U. S. —, undertook to distinguish *Hunter* on the ground that the California referendum on low-rent housing which submitted the issue to majority vote was "neutral on its face" and not "aimed at a racial minority." The regime of *Hunter*, therefore, remains undisturbed. Yet there was no answer to the claim that a referendum solely for housing for the poor violates the Equal Protection Clause. However that may be, in the instant case the target was not the poor, but a racial minority.

correct that we wrote no opinion when we affirmed the three-judge court. While there were other Louisiana laws also held unconstitutional as perpetuating a state segregated school system, the one giving the Governor the right to close any public school ordered integrated seems undistinguishable from this one.

May a State in order to avoid integration of the races abolish all of its public schools? That would dedicate the State to backwardness, ignorance, and existence in a new Dark Age. Yet is there anything in the Constitution that says that a State must have a public school system? Could a federal court enjoin the dismantling of a public school system? Could a federal court order a city to levy the taxes necessary to construct a public school system? Such supervision over municipal affairs by federal courts would be a vast undertaking, conceivably encompassing schools, parks, playgrounds, civic auditoriums, tennis courts, athletic fields, as well as swimming pools.

My conclusion is that the Ninth Amendment has a bearing on the present problem. It provides:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Rights, not explicitly mentioned in the Constitution, have at times been deemed so elementary to our way of life that they have been labeled as basic rights. Such is the right to travel from State to State. *United States v. Guest*, 383 U. S. 745, 758. Such is also the right to marry. *Loving v. Virginia*, 388 U. S. 1, 12. The "rights" retained by the people within the meaning of the Ninth Amendment may be related to those "rights" which are enumerated in the Constitution. Thus the Fourth Amendment speaks of the "right of the people to be secure in their houses, papers, and

effects" and protects it by well-known procedural devices. But we have held that that enumerated "right" also has other facets commonly summarized in the concept of privacy. *Griswold v. Connecticut*, 381 U. S. 479.

There is, of course, not a word in the Constitution, unlike many modern constitutions, concerning the right of the people to education or to work or to recreation by swimming or otherwise. Those rights, like the right to pure air and pure water, may well be rights "retained by the people" under the Ninth Amendment. May the people vote them down as well as up?

A State may not of course interfere with interstate commerce; and to the extent that public services are rendered by interstate agencies the State by reason of the Supremacy Clause is powerless to escape. The right to vote is a civil right guaranteed by the Constitution as we recently reemphasized in *Oregon v. Mitchell*, 400 U. S. 112. In *Anderson v. Martin*, 375 U. S. 399, the State required designation on the ballots of every candidate's race. We said:

"In the abstract, Louisiana imposes no restriction upon anyone's candidacy nor upon an elector's choice in the casting of his ballot. But by placing a racial label on a candidate at the most crucial stage in the electoral process—the instant before the vote is cast—the State furnishes a vehicle by which racial prejudice may be so aroused as to operate against one group because of race and for another. This is true because by directing the citizen's attention to the single consideration of race or color, the State indicates that a candidate's race or color is an important—perhaps paramount—consideration in the citizen's choice, which may decisively influence the citizen to cast his ballot along racial lines." 375 U. S., at 402.

A constitutional right cannot be so burdened. We stated in *West Virginia State Bd. of Educ. v. Barnette*, 319 U. S. 624, 638, that "One's right to life, liberty and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." And we added in *Lucas v. Colorado Gen. Assembly*, 377 U. S. 713, 737, "A citizen's constitutional rights can hardly be infringed simply because a majority of the people" elect to do so. Thus the right of privacy, which we honored in *Griswold*, may not be overturned by a majority vote at the polls, short of a constitutional amendment.

In determining what municipal services may not be abolished the Court of Appeals drew the line between "an essential public function" and other public functions. Whether state constitutions draw that line is not our concern. Certainly there are no federal constitutional provisions which make that distinction.

Closing of the pools probably works a greater hardship on the poor than on the rich; and it may work greater hardship on poor Negroes than on poor whites, a matter on which we have no light. Closing of the pools was at least in part racially motivated. And as stated by the dissenters in the Court of Appeals:

"The closing of the City's pools has done more than deprive a few thousand Negroes of the pleasures of swimming. It has taught Jackson's Negroes a lesson: In Jackson the price of protest is high. Negroes there now know that they risk losing even segregated public facilities if they dare to protest segregation. Negroes will now think twice before protesting segregated public parks, segregated public libraries, or other segregated facilities. They must first decide whether they wish to risk living without the facility altogether, and at the same time

engendering further animosity from a white community which has lost its public facilities also through the Negroes' attempts to desegregate these facilities.

"The long-range effects are manifold and far-reaching. If the City's pools may be eliminated from the public domain, parks, athletic activities, and libraries also may be closed. No one can say how many other cities may also close their pools or other public facilities. The City's action tends to separate the races, encourage private discrimination, and raise substantial obstacles for Negroes asserting the rights of national citizenship created by the Wartime Amendments."

That view has strong footing in our decisions. "The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States." *Loving v. Virginia*, 388 U. S. 1, 10. Cf. *McLaughlan v. Florida*, 379 U. S. 184, 196. "When the effect is to chill the assertion of constitutional rights by penalizing those who choose to exercise them" (*United States v. Jackson*, 390 U. S. 570, 581) that state action is "patently unconstitutional."

While Chief Justice Marshall intimated in *Fletcher v. Peck*, 6 Cranch 87, 130, that the motives which dominate or influence legislators in enacting laws are not fit for judicial inquiry, we do look closely at the thrust of a law to determine whether in purpose or effect there was an invasion of constitutional rights. See *Epperson v. Arkansas*, 393 U. S. 93, 109; *Griffin v. Prince Edward County*, 377 U. S. 218, 231. A candidate may be defeated because the voters are bigots. A racial issue may inflame a community causing it to vote a humane measure down. The federal judiciary cannot become involved in those kinds of controversies. The question for the

federal judiciary is not what the motive was, but what the consequences are.

In *Reitman* an active housing program had been racially dominated and then controlled by a state law ending discrimination. But in time the State reversed its policy and lifted the anti-discrimination controls. Thus it launched or at least tolerated a regime of racially discriminatory housing.

It is earnestly argued that the same result obtains here because the regime of desegregated swimming decreed by District Court is ended and is supplanted by state inspired, state-favored private swimming pools by clubs and others which perpetuate segregation.

We are told that the history of this episode shows the "steel-hard, inflexible, undeviating official policy of segregation" in Mississippi. *United States v. City of Jackson*, 318 F. 2d 1, 5.

I believe that freedom from discrimination based on race, creed, or color has become by reason of the Thirteenth, Fourteenth, and Fifteenth Amendments one of the "enumerated rights" under the Ninth Amendment that may not be voted up or voted down.

Much has been written concerning the Ninth Amendment including the suggestion that the rights there secured include "rights of natural endowment."² Patterson, *The Forgotten Ninth Amendment* 53 (1955).

Mr. Justice Goldberg, concurring in *Griswold v. Connecticut*, *supra*, at 492, said:

" . . . the Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist

² And see Koral, *Ninth Amendment Vindication of Unenumerated Fundamental Rights*, 42 Temple L. J. 46, 53-56 (1968); Bertelsman, *The Ninth Amendment and Due Process of Law*, 37 Cin. L. Rev. 777, 787 *et seq.* (1968); Forkosch, *Does "Secure the Blessings of Liberty" Mandate Governmental Action?* 1 Ariz. St. L. J. 19, 32 (1970).

that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive.³

We need not reach that premise in this case. We deal here with analogies to rights secured by the Bill of Rights or by the Constitution itself. Franklin, *The Ninth Amendment*, 40 *Tulane L. Rev.* 487, 490-492 (1966); Redlich, *Are There Certain Rights Retained by the People?* 37 *N. Y. U. L. Rev.* 787, 810-812 (1962); Black, *The Unfinished Business of the Warren Court*, 46 *Wash. L. Rev.* 3, 37-45 (1970); Kutner, *The Neglected Ninth Amendment*, 51 *Marq. L. Rev.* 121, 134-137 (1968).

"The Fourteenth Amendment and the two escorting amendments establish a principle of absolute equality, an equality which is denied by racial separation or segregation because the separation in truth consecrates a hierarchy of racial relations, and hence permits inequality."⁴

The Solicitor General says

"... to the extent that the municipality had voluntarily undertaken to provide swimming facilities for

³ "Nor am I turning somersaults with history in arguing that the Ninth Amendment is relevant in a case dealing with a *State's* infringement of a fundamental right. While the Ninth Amendment—and indeed the entire Bill of Rights—originally concerned restrictions upon *federal* power, the subsequently enacted Fourteenth Amendment prohibits the States as well from abridging fundamental personal liberties. And, the Ninth Amendment, in indicating that not all such liberties are specifically mentioned in the first eight amendments, is surely relevant in showing the existence of other fundamental personal rights, now protected from state, as well as federal, infringement. In sum, the Ninth Amendment simply lends strong support to the view that the 'liberty' protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments." 381 U. S., at 493.

⁴ Franklin, *The Relation of the Fifth, Ninth and Fourteenth Amendments to the Third Constitution*, 4 *How. L. Rev.* 170, 180 (1958).

its citizens, making it unnecessary for the private sector to develop equally adequate facilities, the closing of the pools has insured that racial segregation will be perpetuated."

Our cases condemn the creation of state laws and regulations which foster racial discrimination—segregated schools, segregated parks, and the like. The present case, to be sure, is only an analogy. The State enacts no law saying that the races may not swim together. Yet it eliminates all its swimming pools so that the races will not have the opportunity to swim together. While racially motivated state action is involved, it is of an entirely negative character. Yet it is in the penumbra⁵ of the policies of the Thirteenth, Fourteenth, and Fifteenth Amendments and as a matter of constitutional policy should be in the category of those enumerated rights protected by the Ninth Amendment. If not included, those rights become narrow legalistic concepts which turn on the formalism of laws not on their spirit.

I conclude that though a State may discontinue any of its municipal services—such as schools, parks, pools, athletic fields, and the like—it may not do so for the purpose of perpetuating or installing *apartheid* or because it finds life in a multi-racial community difficult or unpleasant. If that is its reason, then abolition of a designated public service becomes a device for perpetuating a segregated way of life. That a State may not do.

⁵ While the Equal Protection Clause protects individuals against state action, "the involvement of the State" need not be "either exclusive or direct." *United States v. Guest*, 383 U. S. 745, 755. "In a variety of situations the Court has found state action of a nature sufficient to create rights under the Equal Protection Clause even though the participation of the State was peripheral, or its action was only one of several co-operative forces leading to the constitutional violation." *Id.*, at 755-756.

As MR. JUSTICE BRENNAN said in *Evans v. Abney*, 396 U. S. 435, 453 (dissenting), where a State abandoned a park to avoid integration:

"I have no doubt that a public park may constitutionally be closed down because it is too expensive to run or has become superfluous, or for some other reason, strong or weak, or for no reason at all. But under the Equal Protection Clause a State may not close down a public facility solely to avoid its duty to desegregate that facility."

Hunter and *Reitman* went to the verge of that problem. *Bush* went the whole way. We should reaffirm what our summary affirmance of *Bush* plainly implied.

SUPREME COURT OF THE UNITED STATES

No. 107.—OCTOBER TERM, 1970

Hazel Palmer et al., Petitioners,	}	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
v.		
Allen C. Thompson, Mayor, City of Jackson, et al.		

[June 14, 1971]

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

I agree with the majority that the central purpose of the Fourteenth Amendment is to protect Negroes from invidious discrimination. Consistent with this view, I had thought official policies forbidding or discouraging joint use of public facilities by Negroes and whites were at war with the Equal Protection Clause. Our cases make it unquestionably clear, as all of us agree, that a city or State may not enforce such a policy by maintaining officially separate facilities for the two races. It is also my view, but apparently not that of the majority, that a State may not have an official stance against desegregating public facilities and implement it by closing those facilities in response to a desegregation order.

Let us assume a city has been maintaining segregated swimming pools and is ordered to desegregate them. Its express response is an official resolution declaring desegregation to be contrary to the city's policy and ordering the facilities closed rather than continued in service on a desegregated basis. To me it is beyond cavil that on such facts the city is adhering to an unconstitutional policy and is implementing it by abandoning the facilities. It will not do in such circumstances to say that whites and Negroes are being treated alike because both are denied use of public services. The fact is that closing

the pools is an expression of official policy that Negroes are unfit to associate with whites. Closing pools to prevent interracial swimming is little different from laws or customs forbidding Negroes and whites from eating together or from cohabiting or intermarrying. See *Adickes v. S. H. Kress & Co.*, 398 U. S. 144 (1970); *Loving v. Virginia*, 388 U. S. 1 (1967); *McLaughlin v. Florida*, 379 U. S. 184 (1964); *Lombard v. Louisiana*, 373 U. S. 267 (1963). The Equal Protection Clause is a hollow promise if it does not forbid such official denigrations of the race the Fourteenth Amendment was designed to protect.

The case before us is little if any different from the case just described. Jackson, Mississippi, closed its swimming pools when a district judge struck down the city's tradition of segregation in municipal services and made clear his expectation that public facilities would be integrated. The circumstances surrounding this action and the absence of other credible reasons for the closings leave little doubt that shutting down the pools was nothing more or less than a most effective expression of official policy that Negroes and whites must not be permitted to mingle together when using the services provided by the city.

I am quite unpersuaded by the majority's assertion that it is impermissible to impeach the otherwise valid act of closing municipal swimming pools by resort to evidence of invidious purpose or motive. Congress has long provided civil and criminal remedies for a variety of official and private conduct. In various situations these statutes and our interpretations of them provide that such conduct falls within the federal proscription only upon proof of forbidden racial motive or animus. An otherwise valid refusal to contract the sale of real estate falls within the ban of 42 U. S. C. § 1982 upon proof that the refusal was racially motivated. *Jones v.*

Alfred H. Mayer Co., 392 U. S. 409 (1968). A restaurant's refusal to serve a white customer is actionable under 42 U. S. C. § 1983 where the evidence shows that refusal occurred because the white was accompanied by Negroes and was pursuant to a state-enforced custom of racial segregation. *Adickes, supra*. Just last week in *Griffin v. Breckenridge*, — U. S. — (1971), we construed 42 U. S. C. § 1985 (3) to reach wholly private conspiracies—in that case to commit assault on Negroes—where sufficient evidence of “racial . . . animus” or “invidiously discriminatory motivation” accompanied the conspirators’ actions. *Griffin v. Breckenridge, supra*, — U. S., at —. In rejecting the argument that § 1985 (3) was subject to an implied state action limitation, we indicated that racially motivated conspiracies or activities would be actionable under § 1983 if done under color of law. — U. S., at —. Official conduct is no more immune to characterization based on its motivation than is private conduct, and we have so held many times. The police are vulnerable under § 1983 if they subject a person “to false arrest for vagrancy for the purpose of harassing and punishing [him] for attempting to eat with black people.” *Adickes, supra*, 398 U. S., at 172, or if they “intentionally tolerate violence or threats of violence directed toward those who violated the practice of segregating the races in restaurants.” *Ibid*.

In another decision last week, we reversed a three-judge court ruling in a suit under § 1983 that the multi-member apportionment plan there involved operated to minimize or dilute the voting strength of Negroes in an identifiable ghetto area. However, in an opinion joined by four members of the majority in the instant case, we cautioned that

“the courts have been vigilant in scrutinizing schemes allegedly conceived or operated as purpose-

ful devices to further racial discrimination. . . . But there is no suggestion here that Marion County's multi-member district, or similar districts throughout the State, *were conceived or operated as purposeful devices to further racial or economic discrimination.*" *Whitcomb v. Chavis*, — U. S. —, — (1971) (emphasis added).

Further, motivation analysis has assumed great importance in suits under 42 U. S. C. § 1983 as a result of this Court's opinions in *Younger v. Harris*, 401 U. S. 37 (1971), and its companion cases. There the Court held that even though a state criminal prosecution was pending, federal relief would be appropriate on allegations in a complaint to the effect that state officials were utilizing state criminal statutes in bad faith, with no hope of obtaining valid convictions under them, in an effort to harass individuals in the exercise of their constitutional rights. Obviously, in order to determine its jurisdiction in each such case, a federal court must examine and make a determination of the same kind of official motivation which the Court today holds unreviewable.

In thus pursuing remedies under the federal civil rights laws, as petitioners are doing under §§ 1981 and 1983 here, Negro plaintiffs should have every right to prove that the action of the city officials was motivated by nothing but racial considerations. In examining their contentions, it will be helpful to re-create the context in which this case arises.

I

In May of 1954, this Court held that "[s]eparate educational facilities are inherently unequal." *Brown v. Board of Education*, 347 U. S. 483, 495 (1954). In a series of opinions following closely in time, the Court

emphasized the universality and permanence of the principle that segregated public facilities of any kind were no longer permissible under the Fourteenth Amendment. *Muir v. Louisville Park Theatrical Association*, 347 U. S. 971 (1954), decided two weeks after *Brown*, saw the Court review a decision of the Court of Appeals for the Sixth Circuit which had affirmed a District Court order holding that Negro plaintiffs were entitled to the use of public golf courses and a public fishing lake in Iroquois Park in Louisville, but that the privately owned theatrical association that leased a city-owned amphitheatre in the same park was not guilty of discrimination proscribed by the Fourteenth Amendment in refusing to admit Negroes to its operatic performances. The Court vacated the judgment and remanded "for consideration in the light of the Segregation Cases decided May 17, 1954, . . . and conditions that now prevail." *Ibid.*¹

At the beginning of the October 1955 Term, the Court resolved any possible ambiguity about the action taken in *Muir*. In a pair of summary decisions, the Court made it clear that state-sanctioned segregation in the operation of public recreational facilities was prohibited. *Mayor and City Council of Baltimore v. Dawson*, 350 U. S. 877 (1955), was a summary affirmance of a decision by the Court of Appeals for the Fourth Circuit that officials of the State and city could not enforce a policy of racial segregation at public beaches and bathhouses. On the same day, the Court confirmed that use of a public golf course could not be denied to any person on account of his race. *Holmes v. City of Atlanta*, 350 U. S. 879 (1955).

¹ See *Burton v. Wilmington Parking Authority*, 365 U. S. 715 (1961) (segregated restaurant operated under lease in municipal facility).

The lower federal courts played a very important role in this ongoing process. For example, in June of 1956, a three-judge District Court in Alabama, relying on *Brown*, *Dawson*, and *Holmes*, held that:

" . . . the statutes and ordinances requiring segregation of the white and colored races on the motor buses of a common carrier of passengers in the City of Montgomery and its police jurisdiction violate the due process and equal protection of the law clauses of the Fourteenth Amendment"

Browder v. Gale, 142 F. Supp. 707, 717 (MD Ala. 1956). Again this Court affirmed summarily, citing *Brown*, *Dawson*, and *Holmes*. *Gayle v. Browder*, 352 U. S. 903 (1956). Some public officials remained unconvinced. In early 1958, the Court of Appeals for the Fifth Circuit summarily rejected as without merit an appeal by the New Orleans City Park Improvement Association from a summary judgment including a permanent injunction prohibiting the Association, a municipal corporation, from denying Negroes the use of the facilities of the New Orleans City Park. *New Orleans City Park Improvement Association v. Detiege*, 252 F. 2d 122 (CA5 1958). When the Association took a further appeal to this Court, the judgment was affirmed in a one-line opinion. *New Orleans City Park Improvement Association v. Detiege*, 358 U. S. 54 (1958). Other decisions in this Court and the lower federal courts demonstrated the pervasive idea that officially segregated public facilities were *not* equal.²

² See, e. g., *Boynton v. Virginia*, 364 U. S. 454 (1960) (application of Interstate Commerce Act); *Burton*, *supra*, n. 1; *Turner v. City of Memphis*, 369 U. S. 350 (1962) (public restaurant in municipal airport); *Johnson v. Virginia*, 373 U. S. 61 (1963) (courtrooms); *Brown v. Louisiana*, 383 U. S. 131, 139 (1966) (libraries); *City of St. Petersburg v. Alsup*, 238 F. 2d 830 (CA5 1956) (beach and swimming pool); *Department of Conserv. & Dev. v. Tate*, 231 F. 2d

Throughout the same period, this and other courts rejected attempts by various public bodies to evade their clear duty under *Brown* and its progeny by employing delaying tactics or other artifices short of open defiance. *Cooper v. Aaron*, 358 U. S. 1 (1958); *Burton v. Wilmington Parking Authority*, 365 U. S. 715 (1961); *Watson v. Memphis*, 373 U. S. 526 (1963); *Griffin v. County School Bd. of Prince Edward County*, 377 U. S. 218 (1964).³ Meanwhile countless class suits seeking desegregation orders were successfully prosecuted by Negro plaintiffs in the lower federal courts. Many public facilities were opened to all citizens, regardless of race, without direct intervention by this Court. Several of these local suits are relevant to the present case.

The city of Jackson was one of many places where the consistent line of decisions following from *Brown* had little or no effect.⁴ Public recreational facilities were

615 (CA4), cert. denied, 352 U. S. 838 (1956) (state park); *Willie v. Harris County*, 202 F. Supp. 549 (SD Tex. 1962) (county park); *Shuttlesworth v. Gaylord*, 202 F. Supp. 59 (ND Ala. 1961), aff'd sub nom. *Hanes v. Shuttlesworth*, 310 F. 2d 303 (CA5 1962) (parks, tennis courts, swimming pools, zoos, golf courses, baseball parks, museum, auditorium); *Moorhead v. City of Ft. Lauderdale*, 152 F. Supp. 131 (SD Fla.), aff'd 248 F. 2d 544 (CA5 1957) (golf course); *Ward v. City of Miami*, 151 F. Supp. 593 (SD Fla. 1957) (golf course); *Holley v. City of Portsmouth*, 150 F. Supp. 6 (ED Va. 1957) (golf course); *Fayson v. Beard*, 134 F. Supp. 379 (ED Tex. 1955) (city parks).

³ See also *Green v. County School Board of New Kent County*, 391 U. S. 430 (1968).

⁴ See *Monroe v. Board of Commissioners*, 391 U. S. 450 (1968); *Thomas v. Mississippi*, 380 U. S. 524 (1965); *NAACP v. Thompson*, 357 F. 2d 831 (CA5 1966); *Bailey v. Patterson*, 199 F. Supp. 595 (SD Miss.), vacated 369 U. S. 31 (1962); *United States v. City of Jackson*, 206 F. Supp. 45 (SD Miss. 1962), rev'd 318 F. 2d 1, 5-6 (CA5 1963) (common carrier terminals), where the Court of Appeals stated:

"We again take judicial notice that the State of Mississippi has a steel-hard, inflexible, undeviating official policy of segregation. The

not desegregated although it had become clear that such action was required by the Constitution. As respondents state in their brief in this case:

"In 1963 the City of Jackson was operating equal but separate recreational facilities such as parks and golf links, including swimming pools. A suit was brought in the Southern District of Mississippi to enjoin the segregated operation of these facilities. The City of Jackson took the position in that litigation that the segregation of recreational facilities, if separate but equal recreational facilities were provided and if citizens voluntarily used segregated facilities, was constitutional." Respondents' Brief 2.

This was nearly nine years after *Brown* and more than seven years after *Dawson* and *Holmes*.

The suit respondents refer to was instituted in 1962 as a class action by three Negro plaintiffs who alleged that some city facilities—parks, libraries, zoos, golf courses, playgrounds, auditoriums, and other recreational complexes—were closed to them because of their race. The defendants were Jackson city officials, including Mayor Allen C. Thompson and Director of Parks and Recreation George Kurts, both respondents in the present case. The plaintiffs in that suit were successful. The

policy is stated in its laws. It is rooted in custom. The segregation signs at the terminals in Jackson carry out that policy. The Jackson police add muscle, bone, and sinew to the signs." (Footnotes omitted.)

See also *Evers v. Jackson Municipal Separate School Dist.*, 348 F. 2d 729 (CA5 1965); *Singleton v. Jackson Municipal Separate School Dist.*, 355 F. 2d 865 (CA5 1966); *Singleton v. Jackson Municipal Separate School Dist.*, 419 F. 2d 1211 (CA5 1969), rev'd in part, *Carter v. West Feliciana Parish School Board*, 396 U. S. 290 (1970); *Singleton v. Jackson Municipal Separate School Dist.*, 426 F. 2d 1364 (CA5), modified 430 F. 2d 368 (CA5 1970); *Singleton v. Jackson Municipal Separate School Dist.*, 432 F. 2d 927 (CA5 1970).

District Court's opinion began by stating that Jackson was a city "noted for its low crime rate and lack of racial friction except for the period in 1961 when the self-styled Freedom Riders made their visits." *Clark v. Thompson*, 206 F. Supp. 539, 541 (SD Miss. 1962). It was also stated that Jackson had racially exclusive neighborhoods, that as this residential pattern had developed the city had "duplicated" its recreational facilities in white and Negro areas, and that members of each race "have customarily used the recreational facilities located in close proximity to their homes." *Ibid.* The final finding of fact was that the "defendants are not enforcing separation of the races in public recreational facilities in the City of Jackson. The defendants do encourage voluntary separation of the races." *Ibid.*⁵

Among the District Court's conclusions of law were the following: (1) the suit was not a proper class action since the Negro plaintiffs had failed to show that their interests were not antagonistic to or incompatible with those of the purported class; ⁶ (2) that the three original plaintiffs were entitled to an adjudication by declaratory judgment of "their personal claims of right to unsegregated use of public recreational facilities," 206 F. Supp.,

⁵ In an affidavit filed August 18, 1965, in the District Court in the present case, Mayor Thompson stated, "I believe that the welfare of both races would have best been served if [the custom that members of each race would use the recreational facilities near their homes] had continued."

⁶ But see, *Brown v. Board of Education*, 347 U. S. 483, 495 (1954); *Mayor & City Council of Baltimore City, et al. v. Dawson*, 220 F. 2d 386 (CA4), aff'd 350 U. S. 877 (1955); *Holmes v. City of Atlanta*, 223 F. 2d 93, 94-95 (CA5), rev'd 350 U. S. 879 (1955); *Browder v. Gale*, 142 F. Supp. 707, 714 (MD Ala.), aff'd, 352 U. S. 903 (1956); *New Orleans City Park Improvement Association v. Detiege*, 252 F. 2d 122, 123 (CA5), aff'd 358 U. S. 54 (1958); see also, *Carter v. Jury Comm'n of Greene County*, 396 U. S. 320, 329-330 (1970).

at 542; (3) that injunctive relief was inappropriate as a matter of law;⁷ and (4) that

"The individual defendants in this case are all outstanding, high class gentlemen and in my opinion will not violate the terms of the declaratory judgment issued herein. They know now what the law is and what their obligations are, and I am definitely of the opinion that they will conform to the ruling of this Court without being coerced so to do by an injunction. The City of Jackson, a municipality, of course is operated by some of these high class citizens. I am further of the opinion that during this period of turmoil the time now has arrived when the judiciary should not issue injunctions perfunctorily, but should place trust in men of high character that they will obey the mandate of the Court without an injunction hanging over their heads." 206 F. Supp., at 543.

As the city has stressed in its brief here, it did not appeal from this judgment, which was entered in May 1962. The Negro plaintiffs, however, did appeal, claiming that the relief afforded was inadequate. The Court of Appeals for the Fifth Circuit affirmed *per curiam*, 313 F. 2d 637 (CA5 1963). On December 16, 1963, this Court denied certiorari, 375 U. S. 951.

It must be noted here that none of Jackson's public recreational facilities were desegregated until after the appellate proceedings in *Clark v. Thompson* were fully concluded.* This was true despite the fact that under this Court's prior decisions the only possible result of such review would have been a broadening of the relief granted by the District Judge. Moreover, from the time

⁷ But see cases cited n. 6, *supra*.

* See Respondents' Brief 3; Affidavit of Alien C. Thompson, Appendix 21; Affidavit of George T. Kurts, Appendix 18.

of the trial court's decision in *Clark v. Thompson*, the mayor of Jackson made public statements, of record in this case, indicating his dedication to maintaining segregated facilities. On May 24, 1962, nine days after the District Court's decision in *Clark v. Thompson*, the Jackson Daily News quoted Mayor Thompson as saying:

"We will do all right this year at the swimming pools . . . but if these agitators keep up their pressure, we would have five colored swimming pools because we are not going to have any intermingling.' . . . He said the City now has legislative authority to sell the pools or close them down if they can't be sold." Appendix 15.

A year passed while the appeals in *Clark v. Thompson* were pending, but the city's official attitude did not change. On May 24, 1963, the Jackson Daily News reported that "Governor Ross Barnett today commended Mayor Thompson for his pledge to maintain Jackson's present separation of the races." Appendix 15. On the next day, the same newspaper carried a front page article stating that "Thompson said neither agitators nor President Kennedy will change the determination of Jackson to retain segregation." Appendix 16.

During May and June of 1963, the Negro citizens of Jackson organized to present their grievances to city officials. On May 27, a committee representing the Negro community met with the mayor and two city commissioners. Among the grievances presented was a specific demand that the city desegregate public facilities, including the city-operated parks and swimming pools.

On the day following this meeting, the Jackson Daily News quoted the mayor as saying:

"In spite of the current agitation, the Commissioners and I shall continue to plan and seek money for additional parks for our Negro citizens. To-

morrow we are discussing with local Negro citizens plans to immediately begin a new clubhouse and library in the Grove Park area, and other park and recreational facilities for Negroes throughout the City. We cannot proceed, however, on the proposed \$100,000 expenditure for a Negro swimming pool in the Grove Park area as long as there is the threat of racial disturbances.' " Appendix 15.

On May 30, 1963, the same paper reported that the mayor had announced that "[p]ublic swimming pools would not be opened on schedule this year due to some minor water difficulty." Appendix 5.

The city at this time operated five swimming facilities on a segregated basis: the Livingston Lake swimming facility, in reality a lake with beach facilities, at Livingston Park; a swimming pool in Battlefield Park; a swimming pool and a wading pool in Riverside Park; a pool which the city leased from the Y. M. C. A. in Leavell Woods Park; a swimming pool and a wading pool for Negroes in College Park.⁹ In literature describing its Department of Parks and Recreation, the city stressed that "[o]ur \$.10 and \$.20 charge for swimming . . . [is] the lowest to be found anywhere in the country. The fees are kept low in order to serve as many people as possible." In one of two affidavits which he filed below, Parks' Director Kurts stated that for the years 1960, 1961, and 1962, the average annual expense to the city of operating each of the pools in Battlefield, Riverside, and College Park, was \$10,000. The average annual revenue from the pools in Battlefield and Riverside Parks was \$8,000 apiece; the average annual revenue from the Negro pool in College Park

⁹ At the time *Clark v. Thompson* was decided, the population of Jackson consisted of approximately 100,000 whites and 50,000 Negroes. Despite this 2:1 ratio in population, there were four swimming facilities for whites and only one for Negroes.

was \$2,300. Thus, for these three facilities, the city was absorbing an annual loss of approximately \$11,700, and was doing so "in order to serve as many people as possible."

From the time of the announcement of "minor water difficulty" at the end of May 1963, none of these swimming facilities has operated under public aegis. The city canceled its lease on the Leavell Woods pool, and it has since been operated on a "whites only" basis by its owner, the Y. M. C. A., apparently without city involvement.¹⁰ At oral argument, counsel for the city informed us that the pool that was located in the Negro neighborhood—the College Park pool—"was sold by the City to the Y. The YMCA opened it up and the black people boycotted so it wasn't being used, then the YMCA sold it to the Jackson State College, Jackson State now owns it and operates it . . . for the students at Jackson State and their guests" Transcript of Oral Argument, 31. According to the record below, the Battlefield Park and Riverside Park pools, both in white neighborhoods, have remained closed but have been properly maintained and prevented from falling into disrepair by the city, although they produce no offsetting revenue. The Livingston

¹⁰ I agree fully with the majority that if a city or state becomes involved in any way in the operation of facilities on a segregated basis by private parties, the Fourteenth Amendment is violated.

See *Burton v. Wilmington Parking Authority*, *supra*, n. 1; *Hampton v. City of Jacksonville*, 304 F. 2d 320 (CA5), cert. denied *sub nom. Ghioto v. Hampton*, 371 U. S. 911 (1962); *Smith v. Young Men's Christian Assn. of Montgomery*, 316 F. Supp. 899 (MD Ala. 1970) (city agreement with Y. M. C. A. to coordinate city and Y. M. C. A. recreational activities to eliminate duplication of services had as its primary purpose and effect encouragement and assistance of Y. M. C. A. in maintaining segregated recreational facilities and programs); *Chinn v. Canton*, Civ. No. 3764 (SD Miss., Nov 18, 1965) (unreported) (town leased municipal pool to private all-white association; pool ordered desegregated).

Lake facility has apparently remained in its natural state.¹¹

In August 1965, petitioners brought the present class action in the Southern District of Mississippi. They challenged the closing of the pools and racial segregation in the city jail, seeking both declaratory and injunctive relief. The case was tried on affidavits and stipulations and submitted to the District Judge. In addition to the evidence summarized above, Mayor Thompson filed an affidavit which stated:

"Realizing that the personal safety of all of the citizens of the City and the maintenance of law and order would prohibit the operation of the swimming pools on an integrated basis, and realizing that the said pools could not be operated economically on an integrated basis, the City made the decision subsequent to the Clark case to close all the pools owned and operated by the City to members of both races." Appendix 21.¹²

Parks' Director Kurts filed a similar affidavit, averring

"That after the decision of the Court in the case of Clark v. Thompson, it became apparent that the swimming pools owned and operated by the City of Jackson could not be operated peacefully, safely, or economically on an integrated basis, and the City decided that the best interest of all citizens required

¹¹ During the proceedings in this case, it was developed that the benches in the Livingston Park Zoo were removed in 1961, and that the public rest rooms in the Municipal Court Building were closed at some point in time. See *Palmer v. Thompson*, 419 F. 2d 1222, 1231 (CA5 1970) (dissenting opinion); affidavit of Allen C. Thompson, Appendix 21.

¹² The Mayor's affidavit makes no mention of "minor water difficulty."

the closing of all public swimming pools owned and operated by the City" Appendix 18.¹³

Based on these affidavits, the District Judge found as a fact that the decision to close the pools was made after *Clark v. Thompson* and that the pools could not be operated safely or economically on an integrated basis. Accordingly, he held that petitioners were not entitled to any relief and dismissed the complaint. On appeal, a panel of the Court of Appeals for the Fifth Circuit affirmed. *Palmer v. Thompson*, 391 F. 2d 324 (CA5 1967). On rehearing *en banc*, the Court of Appeals, by a seven-to-six vote, again affirmed dismissal of the complaint. 419 F. 2d 1222 (CA5 1970). Both courts below rejected petitioners' argument that because the pools were closed to avoid court orders that would require their desegregation, the city's action was a denial of equal protection. We granted certiorari to decide that issue, 397 U. S. 1035 (1970), and for the reasons that follow I would reverse.

II

There is no dispute that the closing of the pools constituted state action. Similarly, there can be no disagreement that the desegregation ruling in *Clark v. Thompson* was the event that precipitated the city's decision to cease furnishing public swimming facilities to its citizens.¹⁴ Although the secondary evidence of what the city officials thought and believed about the wisdom of desegregation is relevant, it is not necessary to rely on it to establish the causal link between *Clark v. Thompson* and the closings. The officials' sworn affidavits,

¹³ The Parks' Director's affidavit make no mention of "minor water difficulty."

¹⁴ At oral argument, counsel for the city so conceded. Tr. of Oral Arg. 28-29.

accepted by the courts below, stated that loss of revenue and danger to the citizens would obviously result from operating the pools on an integrated basis. Desegregation, and desegregation alone, was the catalyst which would produce these undesirable consequences. Implicit in this official judgment were assumptions that the citizens of Jackson were of such a mind that they would no longer pay the 10- or 20-cent fee imposed by the city if their swimming and wading had to be done with their neighbors of another race, that some citizens would direct violence against their neighbors for using pools previously closed to them, and that the anticipated violence would not be controllable by the authorities. Stated more simply, although the city officials knew what the Constitution required after *Clark v. Thompson* became final, their judgment was that compliance with that mandate, at least with respect to swimming pools, would be intolerable to Jackson's citizens.

Predictions such as this have been presented here before. One year after the District Court's opinion in *Clark v. Thompson*, this Court reviewed a case in which municipal officials had made the same assumption and had acted upon it. In Memphis, Tennessee, *Brown* and the cases discussed above had little effect until May 1960, when Negro residents sued for declaratory and injunctive relief directing immediate desegregation of the municipal parks and other city-owned and operated recreational facilities. The city agreed that the Fourteenth Amendment required all facilities to be opened to citizens regardless of race and that the majority of city-run facilities remained segregated at the time of suit, six years after *Brown*. It was nevertheless asserted that desegregation was under way and that further delay in achieving full desegregation was the wise and proper course. Both of the lower courts denied plaintiffs relief, the net result being an order directing the city to submit

within six months a plan providing for gradual desegregation of all the city's recreational facilities.

This Court unanimously rejected further delay in integrating these facilities. *Watson v. City of Memphis*, 373 U. S. 526 (1963). It did so although the city asserted its good-faith attempt to comply with the Constitution and its honest belief that gradual desegregation, facility by facility, was necessary to prevent interracial strife. The Court's "compelling answer to this contention [was] that constitutional rights may not be denied simply because of hostility to their assertion or exercise." *Id.*, at 535. See also *Buchanan v. Warley*, 245 U. S. 60, 81 (1917); *Brown v. Board of Education*, 349 U. S. 294, 300 (1955); *Cooper v. Aaron*, 358 U. S. 1, 16 (1968); *Wright v. Georgia*, 373 U. S. 284, 291-293 (1963). The record in the case was reviewed in some detail. I quote at length because of the pertinence of the Court's observations.

"Beyond this, however, neither the asserted fears of violence and tumult nor the asserted inability to preserve the peace was demonstrated at trial to be anything more than personal speculations or vague disquietudes of city officials. There is no indication that there had been any violence or meaningful disturbances when other recreational facilities had been desegregated. In fact, the only evidence in the record was that such prior transitions had been peaceful. The Chairman of the Memphis Park Commission indicated that the city had 'been singularly blessed by the absence of turmoil up to this time on this race question'; notwithstanding the prior desegregation of numerous recreational facilities, the same witness could point as evidence of unrest or turmoil which would assertedly occur upon complete desegregation of such facilities only to a number of anonymous letters and phone calls

which he had received. The Memphis Chief of Police mentioned without further description some 'troubles' at the time bus services was desegregated and referred to threatened violence in connection with a 'sit-in' demonstration at a local store, but, beyond making general predictions, gave no concrete indication on any inability of authorities to maintain the peace. The only violence referred to at any park or recreation facility occurred in segregated parks and was not the product of attempts at desegregation. Moreover, there was no factual evidence to support the bare testimonial speculations that authorities would be unable to cope successfully with any problems which in fact might arise or to meet the need for additional protection should the occasion demand.

"The existing and commendable goodwill between the races in Memphis, to which both the District Court and some of the witnesses at trial made express and emphatic reference as in some inexplicable fashion supporting the need for further delay, can best be preserved and extended by the observance and protection, not the denial of the basic constitutional rights here asserted. The best guarantee of civil peace is adherence to, and respect for, the law.

"The other justifications for delay urged by the city or relied on below are no more substantial, either legally or practically. It was, for example, asserted that immediate desegregation of playgrounds and parks would deprive a number of children—both Negro and white—of the 'present' park budget to provide additional 'supervision' assumed to be necessary to operate unsegregated playgrounds. As already noted, however, there is no warrant in this record for assuming that such added supervision

would, in fact, be required, much less that police and recreation personnel would be unavailable to meet such needs if they should arise. More significantly, however, it is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them. We will not assume that the citizens of Memphis accept the questionable premise implicit in this argument or that either the resources of the city are inadequate, or its government unresponsive, to the needs of all of its citizens." 373 U. S., at 536-538 (footnote omitted).

So it is in this case. The record before us does not include live testimony. It was stipulated by the parties after the District Judge had entered his order denying relief that the "parties had an opportunity to offer any and all evidence desired." The official affidavits filed were even less compelling than the evidence presented by city officials in *Watson*. The conclusion of city officials that integrated pools would not be "economical" was no more than "personal speculation." The city made no showing that integrated operation would increase the annual loss of at least \$11,700—a loss that, prior to 1963, the city purposely accepted for the benefit of its citizens as long as segregated facilities could be maintained. The prediction that the pools could not be operated safely if they were desegregated was nothing more than a "vague disquietude." In *Watson*, the record reflected that the parks commissioner had received a number of anonymous phone calls and letters presumably threatening violence, and that the chief of police had testified about troubles in connection with a sit-in demonstration and desegregation of the city buses. Here, Mayor Thompson's affidavit, filed in 1965, refers only to a time in 1961 "when racial tensions were inflamed by the visits of the

freedom riders to Jackson." Both the Thompson and Kurts affidavits assert that all other public recreational facilities in Jackson were desegregated following *Clark v. Thompson*. Neither affidavit contains the slightest hint—in general or specific terms—that this transition caused disorder or violence.¹⁵ As in *Watson*, there is no factual evidence that city law enforcement authorities would be unable to cope with any disturbances that might arise; unlike *Watson*, however, there is in this record not even a "bare testimonial assertion" that this would be the case.

With all due respect, I am quite unable to agree with the majority's assertion, *ante* p. —, that there is "substantial evidence in the record" to support the conclusion of the lower courts that the pools could not be operated safely and economically on an integrated basis. Officials may take effective action to control violence or to prevent it when it is reasonably imminent. But the anticipation of violence in this case rested only on unsupported assertion, to which the *permanent* closing of swimming pools was a wholly unjustified response. The city seems to fear that even if some or all of the pools suffered a sharp decline in revenues from the levels pertaining before 1963 because Negro and white neighbors refused to use integrated facilities, the city could never close the pools for that reason. I need only observe that such a case, if documented by objective record

¹⁵ In its brief, the city argues: "This Court will take judicial knowledge of the fact that there still exists a serious danger of violent clashes between young people of different racial groups, whether stemming from acts of or promoted by one group or the other." Respondents' Brief 10. But this is, as noted in the text, contrary to the record developed in the courts below. Moreover, at oral argument counsel for the respondents stated that to his knowledge there has been no interracial violence in Jackson since the 1961 freedom rider incidents. See Tr. of Oral Arg. 36.

evidence, would present different considerations. As Judge Wisdom stated below, "We do not say that a city may never abandon a previously rendered municipal service. If the facts show that the city has acted in good faith for economic or other nonracial reasons, the action would have no overtones of racial degradation, and would therefore not offend the Constitution." 419 F. 2d., at 1237 n. 16 (dissenting opinion). It is enough for the present case to reemphasize that the only evidence in this record are the conclusions of the officials themselves, unsupported by even a scintilla of added proof.

Watson counsels us to reject the vague speculation that the citizens of Jackson will not obey the law, as well as the correlative assumption that they would prefer no public pools to pools open to all residents who come in peace. The argument based on economy is no more than a claim that a major portion of the city's population will not observe constitutional norms. The argument based on potential violence, as counsel for the city indicated at oral argument, unfortunately reflects the views of a few immoderates who purport to speak for the white population of the city of Jackson. Tr. of Oral Arg. 36. Perhaps it could have been presented, but there is no evidence now before us that there exists any group among the citizens of Jackson that would employ lawless violence to prevent use of swimming pools by Negroes and whites together. In my view, the Fourteenth Amendment does not permit any official act—whether in the form of open refusal to desegregate facilities that continue to operate, decisions to delay complete desegregation, or closure of facilities—to be predicated on so weak a reed. Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice which they assume to be both widely and deeply held. Surely the promise of the Fourteenth Amendment

demands more than nihilistic surrender. As Mr. Justice Frankfurter observed more than 13 years ago:

"The process of ending unconstitutional exclusion of pupils from the common school system—'common' meaning shared alike—solely because of color is no doubt not an easy, overnight task in a few States where a drastic alteration in the ways of communities is involved. Deep emotions have, no doubt, been stirred. They will not be calmed by letting violence loose—violence and defiance employed and encouraged by those upon whom the duty of law observance should have the strongest claim—nor by submitting to it under whatever guise employed. Only the constructive use of time will achieve what an advanced civilization demands and the Constitution confirms." *Cooper v. Aaron*, 358 U. S., at 25 (concurring opinion).

III

I thus arrive at the question of whether closing public facilities to citizens of both races, whatever the reasons for such action, is a special kind of state action somehow insulated from scrutiny under the Fourteenth Amendment. As the opinions of the majority and MR. JUSTICE DOUGLAS show, most of our prior decisions, because of their facts, do not deal with this precise issue.

Bush v. Orleans Parish School Bd., 187 F. Supp. 42 (ED La. 1960), aff'd 365 U. S. 569 (1961), is relevant. In that case, a three-judge court declared unconstitutional a number of Louisiana statutes designed to avoid desegregation of the public schools in that State. Among the laws stricken down was a statute giving the governor the right to close any school ordered to integrate, a statute giving the governor the right to close all schools if

one was integrated, and a statute giving the governor the right to close any school threatened with violence or disorder. We affirmed the District Court summarily and without dissent. *Ibid.*¹⁶ See also *Hall v. St. Helena*

¹⁶ I cannot agree with the majority's attempt to discount the significance of *Bush*. First, the action taken in *Bush* in no sense depended on our conclusion in *Brown* that the provision of public education was an especially important state function. Had that been the case, and had recreational facilities somehow been considered less essential, the Court should have accepted the argument made by some States that *Brown* not be extended to recreational facilities. This we did not do. See *Dawson, supra*, and *Holmes, supra*. Similarly, if such a distinction was at all tenable, the extension of the "all deliberate speed" approach to desegregating public facilities might have been appropriate. But this argument was also emphatically rejected. See *Watson, supra*, at 529-530. When a public agency furnishes a service—regardless of whether or not it is an "essential" one—it must act in a nondiscriminatory manner with regard to that service.

Second, even accepting the majority's characterization of public schools as "important," there is much in our previous decisions to contradict its implication that providing swimming pools and other public recreational facilities is not a significant state function. In *Evans v. Newton*, 382 U. S. 296, 302 (1966), the Court stated:

"A park . . . is more like a fire department or police department that traditionally serves the community. Mass recreation through the use of parks is plainly in the public domain, *Watson v. Memphis*, 373 U. S. 526; and state courts that aid private parties to perform that public function on a segregated basis implicate the State in conduct proscribed by the Fourteenth Amendment."

See also *Evans v. Abney*, 396 U. S. 435, 443-444, 445 (1970), where MR. JUSTICE BLACK, writing for the Court, stated:

"When a city park is destroyed because the Constitution requires it to be integrated, there is reason for everyone to be disheartened. We agree with petitioners that in such a case it is not enough to find that the state court's result was reached through the application of established principles of state law. No state law or act can prevail in the face of contrary federal law, and the federal courts must

Parish School Board, 197 F. Supp. 649 (ED La. 1961), aff'd 368 U. S. 515 (1962).

Griffin v. County School Board of Prince Edward County, 377 U. S. 218 (1964), is perhaps distinguishable,

search out the fact and truth of any proceeding or transaction to determine if the Constitution has been violated.

"A second argument for petitioners stresses the similarities between this case and the case in which a city holds an absolute fee simple title to a public park and then closes that park of its own accord solely to avoid the effect of a prior court order directing that the park be integrated as the Fourteenth Amendment commands. Yet, assuming *arguendo* that the closing of the park would in those circumstances violate the Equal Protection Clause, that case would be clearly distinguishable from the case at bar because there it is the State and not a private party which is injecting the racially discriminatory motivation. In the case at bar there is not the slightest indication that any of the Georgia judges involved were motivated by racial animus or discriminatory intent of any sort in construing and enforcing Senator Bacon's will."

This was the inquiry made in *Bush*, and it led to striking down the statutes in question. We affirmed that ruling, and the record here is no less clear. And as the majority concedes, *ante* p. —, n. 6, surely it is not irrelevant in considering the context in which Jackson's pools were closed, that a statute of the State of Mississippi, in effect since 1956, provides:

"That the entire executive branch of the government of the State of Mississippi, and of its subdivisions, and all persons responsible thereto, including the governor, the lieutenant governor, the heads of state departments, sheriffs, boards of supervisors, constables, mayors, boards of aldermen and other governing officials of municipalities by whatever name known . . . whether specifically named herein or not . . . shall give full force and effect in the performance of their official and political duties, to the Resolution of Interposition . . . and all of said members of the executive branch be and they are hereby . . . directed and required to prohibit, by any lawful, peaceful and constitutional means, the implementation of or the compliance with the Integration Decisions of the United States Supreme Court of May 17, 1954 (347 U. S. 483, 74 S. Ct. 686, 98 L. ed. 873), and of May 31, 1955 (349 U. S. 294, 75 S. Ct. 753, 99 L. ed. 1083), and to prohibit by any lawful, peaceful, and constitutional

but only if one ignores its basic rationale and the purpose and direction of this Court's decisions since *Brown*. First, and most importantly, *Griffin* stands for the proposition that the reasons underlying certain official acts are highly relevant in assessing the constitutional validity of those acts. We stated:

"But the record in the present case could not be clearer that Prince Edward's public schools were closed and private schools operated in their place with state and county assistance, for one reason, and one reason only: to ensure, through measures taken by the county and State, that white and colored children in Prince Edward County would not, under any circumstances, go to the same school. Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional."

377 U. S., at 231; see also *Gomillion v. Lightfoot*, 364 U. S. 339, 346-348 (1960); *Board of Education v. Allen*, 392 U. S. 236, 243 (1968); *Epperson v. Arkansas*, 393

means, the causing of a mixing or integration of the white and Negro races in public schools, public parks, public waiting rooms, public places of amusement, recreation or assembly in this state, by any branch of the federal government, any person employed by the federal government, any commission, board or agency of the federal government, or any subdivision of the federal government, and to prohibit, by any lawful, peaceful and constitutional means, the implementation of any orders, rules or regulations of any board, commission or agency of the federal government, based on the supposed authority of said Integration Decisions, to cause a mixing or integration of the white and Negro races in public schools, public parks, public waiting rooms, public places of amusement, recreation or assembly in this state." Miss. Code Ann. § 4065.3; see *United States v. City of Jackson*, 318 F. 2d 1, 5-6 (CA5 1963) (judicial notice taken of this statute).

U. S. 97, 109 (1968); Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L. J. 1205 (1970); Note, 83 Harv. L. Rev. 1887 (1970). Second, *Griffin* contains much that is relevant to the kind of decree which would be appropriate if the decision below is reversed. See 377 U. S., at 232-234.

The majority, conceding the relevance of the quoted passage from *Griffin*, states that the "focus in [both *Griffin* and *Gomillion*] was on the actual effect of the enactments, not upon the motivation which led the States to behave as they did." Respondents agree, and argue further that the present record shows only that Jackson has closed facilities that were once open on a segregated basis and that the closing operates equally on Negroes and whites alike.

But if effect was all that the Court considered relevant in *Griffin*, there was no need to mention underlying purpose and to stress the delay that took place in Virginia in implementing *Brown*.¹⁷ More importantly, *Griffin* was only one case in a series stressing that the Fourteenth Amendment rights "declared by this Court in the *Brown* case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.' *Smith v. Texas*, 311 U. S. 128, 132." *Cooper v. Aaron*, *supra*, at 17. It seems to me neither wise nor warranted to limit this principle in a case where the record is as clear as is the one presently before us.

State action predicated solely on opposition to a lawful court order to desegregate is a denial of equal protection of the laws. As Judge Wisdom said in dissent below, the argument that the closing of the pools operated equally on Negroes and whites "is a tired contention, one that

¹⁷ See also, *Green*, *supra*, n. 3.

has been overworked in civil rights cases." 419 F. 2d, at 1232 (dissenting opinion). It was made and rejected in *Griffin*. See, e. g., Brief of Respondent Board of Supervisors of Prince Edward County in *Griffin*, 57-84.¹⁸ It was advanced and rejected in different contexts in *Anderson v. Martin*, 375 U. S. 399 (1964) (designation of race on ballots) and *Loving v. Virginia*, 388 U. S. 1 (1967) (miscegenation law). The same argument was rejected in *Hunter v. Erickson*, 393 U. S. 385, 391 (1969), where we stated that "although the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority. The majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that."

Here, too, the reality is that the impact of the city's act falls on the minority. Quite apart from the question whether the white citizens of Jackson have a better chance to swim than do their Negro neighbors absent city pools, there are deep and troubling effects on the racial minority which should give us all pause. As stated at the outset of this opinion, by closing the pools solely because of the order to desegregate, the city is expressing its official view that Negroes are so inferior that they are unfit to share with whites this particular type of public facility, though pools were long a feature of the city's segregated recreation program. But such an official position may not be enforced by designating certain

¹⁸ In their briefs in *Griffin*, the respondents relied on previous lower court cases that have permitted closing public recreational facilities after decrees had been entered ordering that they be desegregated. See Brief of Respondent Board of Supervisors in *Griffin*, 65-66. See also Brief of Respondents State Board of Education and Sup't of Public Instruction in *Griffin*, 53-63. *Griffin* rejected the relevance of these decisions; however, the present respondents rely on them here and the majority implicitly embraces them.

pools for use by whites and others for the use of Negroes. Closing the pools without a colorable nondiscriminatory reason was every bit as much an official endorsement of the notion that Negroes are not equal to whites as was the use of state National Guard troops in 1957 to bar the entry of nine Negro students into Little Rock's Central High School, a public facility that was ordered desegregated in the wake of *Brown*. See *Cooper v. Aaron*, 358 U. S. 1, 11 (1958). Both types of state actions reflect implementation of the same official conclusion: Negroes cannot be permitted to associate with whites. But that notion had begun to break down as this Court struggled with the "separate but equal" doctrine, see *Brown, supra*, 347 U. S., at 491-494,¹⁹ and I had thought it was emphatically laid to rest in *Brown* itself, where we quoted with approval the finding of a district judge that:

"Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of the Negro children and to deprive them

¹⁹ The Court in *Brown* noted that in *Sweatt v. Painter*, 339 U. S. 629 (1950), the Court had held that a segregated law school for Negroes could not provide them equal educational opportunities, relying in large part on "those qualities which are incapable of objective measurement but which make for greatness in a law school." 339 U. S., at 634. The Court in *Brown* also relied on *McLaurin v. Oklahoma State Regents*, 339 U. S. 637 (1950), in which it was required that a Negro student in a white graduate school be treated like all other students in order to avoid impairing "... his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." 339 U. S., at 641.

of some of the benefits they would receive in a racial[ly] integrated school system.' " 347 U. S., at 494.

These considerations were not abandoned as *Brown* was applied in other contexts, and it is untenable to suggest that the closing of the swimming pools—a pronouncement that Negroes are somehow unfit to swim with whites—operates equally on Negroes and whites. Whites feel nothing but disappointment and perhaps anger at the loss of the facilities. Negroes feel that and more. They are stigmatized by official implementation of a policy which the Fourteenth Amendment condemns as illegal. And the closed pools stand as mute reminders to the community of the official view of Negro inferiority.

Moreover, this Court has carefully guarded the rights of Negroes to attack state-sanctioned segregation through the peaceful channels of the judicial process. This Court has recently discussed and analyzed various provisions of the Reconstruction civil rights statutes, and there is little need here to repeat anything more than the most recent observation that "[t]he approach of this court . . . has been to 'accord [these statutes] a sweep as broad as [their] language.'" *Griffin v. Breckenridge*, — U. S. —, — (1971).²⁰ Of course, 42 U. S. C. § 1981 specifically declares that "all persons . . . shall have the same right . . . to sue . . . as is enjoyed by white citizens" Congress has supplemented this early legislation, and this Court has commented on the importance of private plaintiffs in enforcing civil rights statutes. *Newman v. Piggie Park Enterprises, Inc.*, 390 U. S. 400, 401-402 (1962); see also *NAACP v. Alabama*, 357 U. S. 449 (1958). The Civil Rights Act of 1964 provided an

²⁰ Quoting *United States v. Price*, 383 U. S. 787, 801 (1966); see also *Adickes v. S. H. Kress & Co.*, 398 U. S. 144 (1970); *Jones v. Alfred H. Mayer Co.*, 392 U. S. 409 (1968).

additional avenue for a potential private plaintiff to follow. Provisions of that Act authorize the Attorney General to bring a civil suit in the name of the United States whenever he receives a signed complaint in writing from an individual that such person is being denied equal protection of the laws by being denied equal utilization of any public facilities such as those involved in the present case. 42 U. S. C. § 2000b (a). The Attorney General may bring such a suit if he believes the complaint to be meritorious and certifies that the signer of the complaint is unable, in his judgment, to initiate and maintain an appropriate private suit. *Ibid.* The statute further defines when the Attorney General may deem a complainant unable to initiate or maintain a private action, specifying inability to bear the expense of private litigation and the possibility that "the institution of such litigation would jeopardize the personal safety, employment, or economic standing of such person or persons, their families, or their property." 42 U. S. C. § 2000b (b).

It is evident that closing a public facility after a court has ordered its desegregation has an unfortunate impact on the minority considering initiation of further suits or filing complaints with the Attorney General. As Judge Wisdom said, "the price of protest is high. Negroes . . . now know that they risk losing even segregated public facilities if they dare to protest . . . segregated public parks, segregated public libraries, or other segregated facilities. They must first decide whether they wish to risk living without the facility altogether" 419 F. 2d., at 1236 (dissenting opinion). It is difficult to measure the extent of this impact, but it is surely present and surely we should not ignore it. The action of the city in this case interposes a major deterrent to seeking judicial or executive help in eliminating racial restrictions on the

use of public facilities.²¹ As such, it is illegal under the Fourteenth Amendment. See *Shapiro v. Thompson*, 394 U. S. 618, 631 (1969); *United States v. Jackson*, 390 U. S. 570, 581 (1968); *Dombrowski v. Pfister*, 380 U. S. 479, 486-487 (1965); see also *Oregon v. Mitchell*, 400 U. S. 112, 292 (1970) (concurring and dissenting opinion of MR. JUSTICE STEWART).

IV

From what has been stated above, it is clear that the city's action in closing the pools because of opposition

²¹ Nor should we be lulled by the suggestion that all of Jackson's public facilities have been integrated. As the majority correctly states "[i]f the time ever comes when Jackson attempts to run segregated public pools either directly or indirectly, or participates in a subterfuge whereby pools are nominally run by 'private parties' but actually by the city, relief will be available in the federal courts." This is but a partial summary of the litigation that may lie ahead as some cities attempt to avoid the requirement that public facilities be operated on an integrated basis. It demonstrates that it is surely wrong to suggest that simply because a city presently operates no segregated facilities there is nothing that will need to be done by way of litigation to enforce the Fourteenth Amendment in the future. Assume for instance that it can be shown that a city is providing some form of covert assistance to a "private" organization such as the Y. M. C. A. to run swimming pools on a segregated basis, one for the whites and one for the Negroes; another example would be a "desegregated" public school offering segregated classes, perhaps including physical education and swimming. Although we are all agreed that such conduct is illegal, the majority apparently believes that allowing a city to close public facilities solely because of opposition to desegregation would exert no effect whatsoever on the deliberations of Negro plaintiffs considering a court challenge to these newer, more subtle discriminatory practices. See n. 10 *supra*. To me, it is clear that the majority's edict places a powerful weapon at the disposal of public officials hostile to fulfilling the promise of the Fourteenth Amendment. Threat of suit by Negroes in either case hypothesized above is likely to be countered by a threat, and perhaps action, to close the covertly run segregated pools—in school or out.

to the decision in *Clark v. Thompson* was "an exercise of the state police power which trenches upon the constitutionally protected freedom from invidious official discrimination based on race." *McLaughlin v. Florida*, 379 U. S. 184, 196 (1964). As such, it "bears a heavy burden of justification . . . and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy." *Ibid.*; see also *Loving v. Virginia*, 388 U. S. 1 (1967). The city has only opposition to desegregation to offer as a justification for closing the pools, and this opposition operates both to demean the Negroes of Jackson and to deter them from exercising their constitutional and statutory rights. The record is clear that these public facilities had been maintained and would have been maintained but for one event: a court order to open them to all citizens without regard to race. I would reverse the judgment of the Court of Appeals and remand the cause for further proceedings.

SUPREME COURT OF THE UNITED STATES

No. 107.—OCTOBER TERM, 1970

Hazel Palmer et al., Petitioner, v. Allen C. Thompson, Mayor, City of Jackson, et al.	}	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
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[June 14, 1971]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN and MR. JUSTICE WHITE join, dissenting.

While I am in complete agreement with the opinions of JUSTICES DOUGLAS and WHITE, I am obliged to add a few words of my own.

First, the majority and concurring opinions' reliance on the "racially equal effect upon all citizens" of the decision to discontinue all public pools is misplaced. As long ago as 1948 in *Shelley v. Kraemer*, 334 U. S. 1, 22 (1948), this Court held:

"The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."

In short, when the officials of Jackson, Mississippi, in the circumstances of this case, detailed by MR. JUSTICE WHITE, denied a single Negro child the opportunity to go swimming simply because he is a Negro, rights guaranteed to that child by the Fourteenth Amendment were lost. The fact that the color of his skin is used to prevent others from swimming in public pools is irrelevant.

Second, since *Brown v. Board of Education*, 347 U. S. 483 (1954), public schools and public recreational facilities such as swimming pools have received identical Fourteenth Amendment protection. Indeed, exactly one week after *Brown I* this Court remanded three cases in the same *Per Curiam*: *Florida ex rel. Hawkins v. Board of Control of Florida et al*; *Tureand v. Board of Supervisors*; and *Muir v. Louisville Theatrical Association*, 347 U. S. 970. The first two involved university education and the latter involved recreational facilities.

Even before *Brown II* it was recognized as obvious that "racial segregation in recreational activities can no longer be sustained as a proper exercise of the police power of the State; for if that power cannot be invoked to sustain racial segregation in the schools, where attendance is compulsory and racial friction may be apprehended from the enforced commingling of the races, it cannot be sustained with respect to public beach and bathhouse facilities, the use of which is entirely optional." *Dawson v. Mayor and City Council of Baltimore*, 220 F. 2d 386, 387 (1955), *aff'd per curiam*, 350 U. S. 877. See also *Department of Va. v. Tate*, 231 F. 2d 615 (1956), *cert. denied* 352 U. S. 838.

By effectively removing publicly owned swimming pools from the protection of the Fourteenth Amendment—at least if the pools are outside school buildings—the majority and concurring opinions turn the clock back 17 years. After losing a hard fought legal battle to maintain segregation in public facilities, the Jackson, Mississippi, authorities now seek to pick and choose* which of the existing facilities will be kept open. Their

*The economic loss incident to the operation of public swimming pools could not be much more than that incident to maintaining public golf courses that charge green fees of \$.75 to \$1.25, admittedly the lowest in the country.

choice is rationalized on the basis of economic need and is even more transparent than putting the matter to a referendum vote.

Finally, I cannot conceive why the writers of the concurring opinions believe that the city is "locked in" and must operate the pools no matter what the economic consequences. Certainly, I am not bound by any admission of an attorney at oral argument as to his version of the law. Equity courts have always had continuing supervisory powers over their decrees; and if a proper basis for closing the facilities—other than a conclusory statement about the projected human and thus economic consequences of desegregation—could be shown, swimming pools, as I imagine schools or even golf courses, could be closed.

I dissent.